# JURISDICTION TO TRY INDIVIDUALS FOR VIOLATIONS OF THE LAW OF WAR: THEORY AND PRACTICE

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# Jurisdiction to Try Individuals for Violations of the Law of War: Theory and Practice

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Table of Contents

## I. SCOPE

Theories of penal jurisdiction to try individuals for violations of the laws and customs of war have evolved slowly and painfully through centuries of human experience. This paper presents a brief history of that evolution and attempts to assess the practical value of the resulting wisdom in today's world.

Jurisdiction is defined as the competence to prosecute and punish violators of the laws of war.[1] The term "violators of the laws of war" includes those accused of crimes against peace and crimes against humanity as well as war crimes and conspiracy to commit such crimes as defined in Article six of the Charter of the International Military Tribunal at Nuremberg.[2]

The meaning of the label "war" changes from time to time and from context to context and is an integral part of the evolution of jurisdictional theory. In looking at past conflicts, the determination of the world community at the time in question will be given substantial weight in deciding whether the laws of war applied. Deference to experience, however, will not be allowed to limit the range of inquiry concerning solutions to current problems.

Many types of sanctions other than individual criminal responsibility have been used in an attempt to enforce the laws and customs of war. It is not within the scope of this paper to discuss at length such sanctions as reprisals and public opinion which have been more or less effective in some cases. Such sanctions will be discussed in those instances in which they relate to the effective application of jurisdictional theory.

### A. VALUES TO BE PROTECTED BY SANCTIONS AGAINST VIOLATIONS OF THE LAWS OF WAR

There is no question but that war is a breakdown of minimum world order

and an indication that international control procedures have failed. Just because there has been a breakdown in minimum world order, however, does not mean that there cannot be a "retreat position" concerning the conduct of the war itself. There are still human and material values which need not be damaged nor destroyed and may be protected by enforcement of the law of war. As stated in a recent treatise: "The historic function of the laws of war has been to impose limitations upon international violence in the common interest of the community of states."[3]

It must be recognized, however, that to stress the protection of human and material values to the exclusion of military reality would be self-defeating and inevitably result in greater destruction of the values sought to be protected. The complimentary doctrines of "military necessity" and "humanity"[4] historically are used to express the compromise necessary in real world situations. Professors McDougal and Feliciano set out the required balance succinctly:

> Each territorial community has a most direct and immediate interest in maintaining its security, that is, in protecting the integrity of its fundamental bases of power and the continued functioning of its internal social processes from the obstruction of unlawful violence. Each such community has consequently an interest in authority to exercise the force indispensable and appropriate for maintaining or re-establishing its security. Each territorial polity has at the same time an interest in reducing to minimal levels the destruction of values, both of itself and others, that attends such efforts.[5]

The "humanity" side of the equation includes material values as well as human values and some that are difficult to catagorize. Obviously the most important value to be protected is life itself, followed closely by the prevention of human suffering and the preservation of human dignity. A specific list of values protected by the laws of war and enforced by many kinds of sanctions, including criminal sanctions against individual violators, could go on indefinitely and vary depending on the value determinations of the individuals and states. It should be obvious to everyone, however, that hostilities

must end sometime and intercourse between the belligerents re-established. Consequently, an essential value to be preserved is at least enough good faith between the parties to leave undamaged a basis for a return to peace, short of total annihilation of one or both sides.[6]

Humanitarianism encompasses the basic belief that non-coercive, rather than coercive, practices are best. Even in a situation in which force is being used, excessive use of force and the consequent unnecessary destruction of values can and should be prevented. McDougal and Feliciano place humanitarianism in context:

> When conceived ... as one manifestattion of a profound preference -- however justified in terms of religion, secular philosophy, sociology, psychology, or otherwise -- for the shaping and sharing of values by non-coercive, rather than coercive, modes, the principle of humanity may be seen to be a basic postulate of any international law of human dignity.[7]

B. NECESSITY FOR APPLYING SANCTIONS DIRECTLY AGAINST INDIVIDUALS

International law has operated traditionally between states, and individuals were touched by international law only derivatively through one or more states. There is nothing inherent in the individual, however, to make him unsuitable as a subject of international law, especially international criminal law.

The essence of a crime in any jurisdiction is that the act injures society in addition to any injury that may occur to one or more individuals. Piracy has long been considered a crime under international law, and it has been universally conceded that any state could seize a pirate for trial and punishment.[8] Violations of the law of war include acts that are prohibited in every state (murder, rape, etc.) as well as others that are especially related to war and the maintenance of peace. However, all share the common fault of injuring society in general. In the international sphere the concept of

society is simply broader.

With the exception of the laws of war, violations of international law by persons in the service of the state have been imputed to and considered violations by the state.[9] Even so, individuals have been held responsible and punished for war crimes. The individuals so tried have usually been members of political, military, or economic elites of defeated powers, but the objectives have not differed greatly from purposes for which criminal justice is administered in municipal systems.[10] The major task in the international sphere is implementation:

> Perhaps few will doubt that the present corpus of authoritative myth permits the punishment of individual persons responsible for impermissible recourse to violence, and that the real problem is creating appropriate international institutions and sustaining perspectives and dispositions of effective power for the implementation of authority.[11]

Various defenses, such as superior orders and acts of state, have been raised, which, if extended to the ultimate degree, would render individuals immune from punishment. The tribunals convened at the end of World War II, at least, refused to accept such pleas as a complete defense and applied the well-established municipal criminal law principle requiring that the criminal intent of the defendant be established as an essential element of the crime.

If the goals of sanctions against violations of the laws of war are deterrence and repression of violations, it would appear that such sanctions would have to apply directly against individuals. States and state agencies are made up of individuals and operate only through individuals. It is not only conceivable but quite probable that individuals in a position to affect state policy would be able to remain relatively safe during hostilities and accumulate enough personal wealth to live comfortably despite the outcome of the hostilities and regardless of the sanctions taken against their state.

If this state of affairs is considered probable, or even possible, no

combination of sanctions against violations of the laws of war can be expected to be reasonably effective unless criminal sanctions apply directly against the individuals responsible. As stated in the Judgment of the International Military Tribunal at Nuremberg:

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both those submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized.... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[12]

## C. AVAILABILITY OF TRIBUNALS TO TRY INDIVIDUALS

The sanction of individual criminal responsibility implies a tribunal or tribunals where those accused of war crimes may be tried. At least this is implied if we eschew the custom of punishment without a trial as practiced in the not too distant past.[13]

Individuals have been subjected to the jurisdiction of both international and municipal war crimes tribunals.[14] Since there is no permanent international criminal court with jurisdiction over war crimes, the international tribunals necessarily have been ad hoc bodies and not necessarily composed exclusively of nationals of victorious belligerents.[15] Municipal tribunals have tried not only enemy and neutral nationals, but nationals of the prosecuting state who violated municipal regulations which restate principles of the international law of war.[16]

The tribunal which may try an individual for an alleged breach of the laws of war is greatly affected by the theory on which jurisdiction is based.[17] The tribunal which should try an individual depends to a great extent on the location best suited for an impartial hearing. The highly emotional nature

of such trials make impartial hearings difficult at best and almost impossible in some locations, such as in the state of the victims of recent atrocities.

## II. HISTORY OF PENAL JURISDICTION OVER WAR CRIMES

The history of any human activity is a record of the interaction of abstract thought and experience in solving problems. The history of penal jurisdiction over war crimes is no exception. The problem of unnecessary destruction of values caused the formulation of theories of individual responsibility and punishment. These theories were tested, in whole or in part, in an attempt to deter the undesirable acts. The successes and failures of the theories in practice were noted, and new or altered theories were formulated and the cycle continues.

There are five basic principles on which states acting individually and groups of states acting jointly have invoked in making claims to penal jurisdiction. One or more of these theories of jurisdiction historically have been used as the basis of claimed rights to try individuals for allegedly breaking society's rules, whether the rules have been catagorized municipally or internationally. Those principles are:

> First, the territorial principle determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourthly, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence.[18]

### A. EXPERIENCE PRIOR TO WORLD WAR II

Customary international law has long recognized the right of a belligerent to punish members of enemy armed forces who have violated the laws and customs

of war.[19] It is difficult, however, to separate the juridical function of sanctions against those individuals who went beyond the bounds of the law and custom of war from the exercise of revenge against the nearest available members of enemy forces. Certainly, the doctrine of reprisals has been mingled with the concept of sanctions against war crimes.

### 1. Classical Writers

Long before the modern era, writers concerned with the laws and customs of war approved the principle of punishment of individual members of enemy forces who violated such customs. Grotius, mingling the concepts of reprisal and sanctions against the violation of the laws of war, concluded that an individual who did an injury not allowed by the customs of war was liable in his person to reprisals.[20]

Some writers, such as Wolff, have discussed the rights of the prisoner of war in relation to his captors:

> ... it is not allowable to kill those captured in war, not even immediately, much less at some other time, unless some special offense shall have been committed because of which they are liable to punishment.[21]

and Vattel:

> There is, however, one case where life may be denied an enemy who surrenders.... This is when the enemy has been guilty of some enormous breach of the law of nations and particularly if it be at the same time a violation of the laws of war. This denial of quarter is no natural consequence of the war, but the punishment of his crime; a punishment which the injured party has a right to inflict: but for the penalty to be just it must fall on the guilty.[22]

Others discuss the disposition of enemy subjects after the hostilities have ended. Suarez takes the view that the guilty can be punished, but he seems to counsel leniency:

> ... after the war has been entirely ended, certain guilty individuals among the enemy may also, with justice, be put to death...[23]

also:

> ... in such a judgment, the offender cannot be visited with every sort of punishment nor deprived of all his property without any restrictions, but may be punished only in proportion to his fault.[24]

Gentili saw the victor as a judge to pass on the punishment to be inflicted on the defeated enemy, collectively and individually. He also stressed the values of justice and moderation.[25] Victoria stated a view smacking of the universality principle:

> ... be it observed that princes have authority not only over their own subjects, but also over foreigners so far as to prevent them from committing wrongs, and this is by the law of nations and by the authority of the whole world.[26]

He continues:

> Even when victory has been won and no danger remains, it is lawful to kill the guilty ... this is permissible against our own wrong-doing citizens. Therefore also against foreigners; for ... a prince when at war has by right of war the same authority over the enemy as if he were their lawful judge and prince.[27]

However:

> ... it is not right to kill all the guilty among the enemy. We ought, then, to take into account the nature of the wrong done by the enemy and of the damage they have caused and of their other offences, and from that standpoint to move to our revenge and punishment, without any cruelty and inhumanity.[28]

All of the classical writers espoused the common theme that to the victor belongs not only the spoils but also the competence to pass judgment on enemy individuals. The asserted right to punish members of their own military forces could be based on the nationality principle. The right over the enemy, however, if we are to discount revenge, must have been based on one or more of the other principles of jurisdiction. It appears likely that some rudimentary idea of universality was one such basis.

## 2. Early International Conferences Dealing With the Laws of War

Beginning about the middle of the nineteenth century, there were a series

of international conferences dealing with various aspects of the laws and customs of war.[29] All dealt with the problems of bringing into existence a code of rules which would be recognized as binding on belligerents and neutrals in the retreat position of force as a means of settling international disagreements. The various declarations and conventions resulting from the conferences are full of language deploring the needless suffering of individuals and the wanton destruction of property. Many specific rules are set forth regulating the conduct of belligerents and neutrals and prohibiting certain activities so far as permitted by military necessity.

These conferences resulted in the Declaration of Paris[30] in 1856; the Declaration of St. Petersburg[31] in 1868; the Geneva Convention of 1864;[32] a draft convention prepared by the Geneva Conference of 1868 [33] which never became effective; the Geneva Convention of 1906;[34] the various Conventions, Declarations, Resolutions and Wishes prepared by the Hague Peace Conferences in 1899 and 1907;[35] and the Declaration of London in 1909.[36] None of these international agreements contained any specific sanctions against individuals.

The method of dealing with individual violators was occasionally mentioned. In article twenty-eight of the Geneva Convention of 1906 is found the following language:

> The Signatory Governments also undertake to adopt, or to propose to their legislative bodies, should their military law be insufficient for the purpose, the measures necessary for the repression in time of war of individual acts of pillage and maltreatment of the wounded and sick of armies, as well as for the punishment, as an unlawful employment of military insignia, of the improper use of the Red Cross flag and armlet (brassard) by officers and soldiers or private individuals not protected by the present Conventions.[37]

In article forty-one of the Conventions With Regard to the Laws and Customs of War on Land of both 1899 and 1907, it is stated, concerning violations of the terms of armistice:

> A violation of the terms of the armistice by individuals acting on their own initiative, only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for

the losses sustained.[38]

Article twenty-one of the 1907 Convention for the Adaption of the Principles of the Geneva Convention to Maritime War is similar to article twenty-eight of the Geneva Convention of 1906.[39] Finally, article sixty-six of the Declaration of London of 1909 states:

> The Signatory Powers undertake to insure in any war in which all the belligerents are parties to the present Declaration the mutual observance of the rules contained herein. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their prize courts.[40]

It can be seen that, although the above provisions do not specifically state so, the generally accepted idea was that each state should punish its own nationals who violated the laws of war, as stated by the Conventions and Declarations, in its own tribunals. It was thought that the solemn promises of nations would be enough to insure the observance of international obligations and, if not, public opinion would force compliance.[41]

### 3. Aftermath of World War I

At the cessation of hostilities in World War I, the victorious Allied Powers met at Versailles for the purpose of drafting a peace treaty. At the plenary session of the Preliminary Peace Conference on January 25, 1919, it was decided to create a commission to inquire into and report upon the responsibility of the authors of war, the facts regarding breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, the degree of responsibility for these offenses attaching to particular members of the enemy forces, and the constitution and procedure of a tribunal appropriate for the trial of such offenses.[42]

The Commission reported back to the Preliminary Conference on March 19, 1919. Recommendations concerning a tribunal were sub-divided into two sections.

Regarding the acts which provoked the war and accompanied its inception, the Commission did not consider these as strictly war crimes and did not recommend individual prosecution and punishment. It did recommend that in the future, penal sanctions should be provided for such outrages.[43]

With regard to violations of the laws and customs of war, the Commission, relying on customary international law, stated that every belligerent had the power and authority to try individuals alleged to be guilty of war crimes if they had physical custody of the individuals. It stated further that each belligerent had the power to set up appropriate tribunals for the trial of such cases.[44] The Commission recommended that a high tribunal be established for the trial of individuals accused of war crimes committed over wide geographical areas or against the nationals of several Allied nations.[45]

The high tribunal recommended by the Commission was to be composed of three persons appointed by each of the major Allied and Associated Powers. The tribunal was to have the power to determine its own procedure, to sit in divisions of not less than five members, to appoint experts to assist in the trial of cases, and to request national courts to assume jurisdiction for the purpose of determining facts or for trial and judgment. Provision was made for a Prosecuting Commission of five members to be appointed by the major Powers. National courts were prohibited from proceeding with the trial of an individual selected by the Prosecuting Commission for trial before the high tribunal. It was finally specified that the law to be applied by the high tribunal was to be "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience."[46]

The final draft of the Versailles Treaty,[47] in article 227, provided for the public arraignment of the former German emperor for offenses against international morality and the sanctity of treaties. He was to be tried by a

special tribunal composed of one judge from each of the principle Allied and Associated Powers. The former emperor, William II of Hohenzollern, fled to the Netherlands and was never tried.[48]

Articles 228 and 229 of the Treaty provided for the trial of other war criminals as follows:

> Article 228 - The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such person shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.
> The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office, or employment which they held under the German authorities.
>
> Article 229 - Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of the Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military Tribunals composed of the members of the military tribunals of the Powers concerned....

A long list of accused persons was prepared in accordance with article 228 and presented to the German Government by the principal Allied Governments. The German Government objected to surrendering the accused persons, representing that the Government's very existence might be imperiled by the political repercussions. It was proposed by the Germans that a reduced number of persons be tried before the Supreme Court of the Empire in Leipzig.[49]

The Allied Governments decided that the proposal was compatible with article 228 of the Treaty and declined to take any part in the trials. They did reserve the right to consider the results of the prosecutions, and if the procedure proposed by Germany did not result in just punishment for the guilty, to bring the accused before Allied tribunals.[50] Eventually an abridged list of forty-five names was submitted to the German Government for trial. The Germans complained that they could not find certain of the individuals and

that evidence was lacking against others. Twelve trials were finally held at Leipzig resulting in six convictions with light sentences.[51] The peace treaties with Germany's allies were concluded after the Versailles pact and were modeled on it, particularly with regard to war crimes. Apparently no trials were conducted pursuant to these treaties.

### 4. The Geneva Conventions of 1929

At a conference in Geneva in 1929, attended by representatives of most of the nations of the world, two Conventions concerning the laws of war were approved. Both were signed on July 27, 1929, and entered into force June 19, 1931.

The Prisoners of War Convention[52] contained no mention of sanctions against individual violators. The Convention Concerning the Amelioration of the Conditions of the Wounded and Sick of Armies in the Field (Red Cross Convention),[53] on the other hand, contained provisions similar to those in earlier Conventions and Declarations looking to states to punish their own nationals. Article twenty-eight required the Governments of the High Contracting Parties to recommend necessary measures to their legislatures, if not already sufficient, to prevent private persons and unauthorized societies from using the emblem or name of the "Red Cross" or "Geneva Cross" and to protect certain designations of the Swiss Confederation. Article twenty-nine was more general and required the Governments of the High Contracting Parties whose penal laws were not already adequate to recommend to their legislatures the necessary measures to repress, in time of war, acts in contravention of the provisions of the Convention. Finally, article thirty provided for an investigation upon the request of a belligerent alleging a violation of the Convention. If a violation was proved, it was to be ended and repressed by the belligerents as soon as possible. No specific methods of repression were mentioned.

## B. EXPERIENCE DURING AND AFTER WORLD WAR II

There were many official pronouncements by Allied statesmen during World War II indicating that there would be individual punishment of Axis war criminals if the Allied Powers prevailed. Even before the United States entered the war, President Roosevelt joined Prime Minister Churchill in a warning to the Axis Powers that there would be punishment for war crimes.[54]

Atrocities committed behind the German lines in Russia were particularly frequent and brutal. On November 7, 1941, M. Molotov sent a note to all nations having diplomatic relations with the Soviet Union, noting the atrocities and stating that they violated the most elementary rules of international law and human morality. After receiving additional information concerning German actions, Molotov, on January 6, 1942, circulated a further note declaring that the Soviet Government held the Hitlerite Government responsible for the crimes committed by German troops.[55] Early in 1942 nine European Powers[56] issued the Declaration of St. James Palace in which, after describing the actions of German nationals constituting war crimes, they pledged to:

> ... place among their principal war aims the punishment, through the channels of organized justice, of those guilty or responsible for those crimes, whether they have ordered them, perpetrated them, or participated in them ...[57]

In July, 1942, the atrocities of the German army continuing in occupied territories, the nine powers who signed the Declaration of St. James Palace made a collective approach to the Governments of the United States, Great Britain, Soviet Russia, and the Holy See asking that those powers "solemnly warn those guilty of such acts". The Governments of the United States, Great Britain, and Soviet Russia replied, promising the trial of those accused of war crimes.

In a Declaration issued in Moscow on November 1, 1943, Roosevelt, Churchill, and Stalin stated that at the time of any armistice the German officers, men,

and members of the Nazi Party responsible for enumerated war crimes or those taking a consenting part in them would be tried and punished according to the laws of the liberated countries where the crimes took place. They stated further that if the crimes had no particular geographical location, the responsible participating individuals would be "punished by a joint decision of the Governments of the Allies."[58] A statement of intention to mete out punishment for individual violations of the laws of war was also included in official pronouncements made at the Potsdam Conference.[59]

### 1. International Military Tribunal at Nuremberg

In 1945 the major Allied Powers convened an International Conference on Military Trials in London. The delegates from the United States, Great Britain, France, and Soviet Russia who met at London represented a great divergence in legal concepts and traditions.[60] Great Britain and the United States adhered to the common law approach; and France and Soviet Russia, to the civil law or continental approach. There were also significant differences between the French and Soviet concepts of law due to differences in origin, tradition, and philosophy.

All delegates agreed that the major figures of the German Government should be brought before an international tribunal, but there was a fundamental difference between the way the Soviet delegates viewed the functions of the proposed tribunal and the way the delegates from the other three powers viewed them. While the United States, France, and Great Britain contemplated as impartial and independent a tribunal as possible under the circumstances, the Soviet delegates viewed the proposed tribunal as just one of the organs of the Governments of the victorious Powers to be used to carry out previously agreed upon political policy. As stated by a Soviet delegate, General Nikitchenko, during the session of the Conference on June 29, 1945:

> We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations by the heads of the governments, and those declarations both declare to carry out immediately just punishment for the offenses which have been committed.[61]

Later the same day he stated:

> ... the Soviet Delegation points out that, at the time when the declaration was made by the leaders of the United Nations on the question that the chief criminals should be tried, it was not certain whether these criminals would actually be tried by a court or would be punished by some purely political action. That is to say, they might have been dealt with by means other than a trial. Since then it has been decided that they shall go through a process of trial, but the object of that trial is, of course, the punishment of the criminals, and therefore the role of the prosecutor should be merely a role of assisting the court in the actual cases ... and there would be no question that the judge has the character of an impartial person.[62]

Much of the time of the Conference was spent in discussing the United States' proposal for allowing the proposed tribunal the jurisdiction to try certain Nazi organizations on charges of criminality as a means of reaching thousands of individual members at later trials. The Soviet delegates opposed the plan, General Nikitchenko, stating during the June 29 session:

> The Soviet Delegation explains this point by the fact that organizations such as the S.S. or the Gestapo have already been declared criminal by authorities higher than the Tribunal itself, both in the Moscow and Crimea declarations, and the fact of their criminality has definitely been established. We cannot imagine any position arising in which the Tribunal might possibly bring out a verdict that any one of these organizations was not criminal when it has most definitely been labeled so by the governments.[63]

One of the most serious disagreements between the United States and Soviet Russia was on the definition of the crimes over which the proposed tribunal was to have jurisdiction. The Soviet delegation proposed a definition which had the effect of declaring certain acts crimes only when committed by Nazis. The United States contended that the criminal character of the acts did not depend on who committed them. At the final meeting of the Conference, the Soviet delegation accepted in principle the United States' view of international crimes, and the United States agreed that the proposed tribunal would have

jurisdiction only over individuals who committed such crimes on behalf of the Axis Powers.

The London Conference produced the London Agreement of 8 August 1945.[64] This Agreement, after citing the Moscow Declaration and stating that the major powers were acting in the interests of all the United Nations, declared:

> Article 1. There shall be established after consutation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.
>
> Article 2. The constitution, jurisdiction, and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

The Agreement went on to require the Signatories to assist in the investigation and trial of persons before the International Military Tribunal. It specifically stated that nothing in the Agreement would prejudice the provisions of the Moscow Declaration pertaining to the return of war criminals to the countries where they committed their crimes nor would prejudice the jurisdiction or powers of national or occupation courts established for the trial of war criminals. Other provisions allowed adherence to the Agreement by any Government of the United Nations.

The Charter of the International Military Tribunal was a separate document attached to the London Agreement. It provided for the establishment of a tribunal composed of four members, with an alternate for each. One member and one alternate were to be appointed by each of the Signatories. Regarding jurisdiction the Charter provided in Chapter II:

> Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:
> (a) CRIMES AGAINST PEACE ...
> (b) WAR CRIMES ...

> (c) CRIMES AGAINST HUMANITY ...
> Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Chapter II also specifically ruled out consideration of official position, including Heads of State, and provided that a defendant would not be free from responsibility because he acted pursuant to an order of his Government or of a superior. Such orders could be considered, however, in mitigation of punishment. Of particular interest, in view of the negotiations at the London Conference, were provisions contained in articles nine and ten:

> At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization ...
> In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

The remainder of the Charter provided for procedures for prosecution and defense, the powers of the Tribunal, the manner of presenting evidence, and the allocation of expenses. Chapter III provided that the decision of the Tribunal as to guilt or innocence was final and not subject to review. Regarding sentences, the Tribunal could impose death or any lesser punishment and, in addition, could deprive any convicted person of stolen property and order its delivery to the Control Council for Germany, which was composed of the four major Allied Powers. The sentences imposed by the Tribunal were to be carried out by the Control Council, which could reduce or otherwise alter the sentence but could not increase its severity.

Nineteen nations,[65] other than the four major Allied Powers, subscribed to the principles of the Charter, and a common indictment for all twenty-three nations was presented at Nuremberg. The indictment named twenty-four individuals and seven organizations as defendants. Only twenty-one individuals

together with the organizations were actually tried,[66] in hearings beginning in November, 1945.[67] The judgment of the Tribunal was delivered on September 30 and October 1, 1946. Of the twenty-one individuals, six were convicted on all four counts of the indictment and three were acquitted on all charges. Others were acquitted on one or more counts but convicted on at least one count. Twelve of the convicted defendants were sentenced to death; and the others, to various periods of confinement. Of the seven accused organizations, four were declared criminal with limitations, and three were not declared criminal.[68] The Soviet member of the Tribunal dissented from the judgment, declaring that the three individuals acquitted should have been convicted and that all seven organizations should have been declared criminal. He also disagreed with the life sentence assessed against one defendant, stating that the death penalty should have been imposed.

Those persons sentenced to death -- with the exceptions of Bormann who was never found and Goering who committed suicide in his cell -- were executed in Nuremberg on October 16, 1946, pursuant to the orders of the Control Council. The defendants sentenced to confinement were incarcerated in a jail at Spandau.[69]

On December 11, 1946, the General Assembly of the United Nations passed a resolution taking note of the International Military Tribunal at Nuremberg and the Charter of the International Military Tribunal for the Far East and affirming the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal.(The judgment of the Tribunal for the Far East was not delivered until November, 1948.) By the Resolution, the General Assembly also recognized its obligation under the United Nations Charter to initiate studies and make recommendations for encouraging the progressive development of international law and its codification and directed the Committee on the Codification of International Law to "treat as a matter of primary importance" the codification of the principles recognized in the Charter and Judgment of

the Nuremberg Tribunal.[70]

2. International Military Tribunal for the Far East

The basic policy for the prosecution and punishment of major Japanese war criminals was the "Proclamation Defining Terms for Japanese Surrender"[71] issued by the United States, the Republic of China, and Great Britain at Potsdam on July 26, 1945, and later adhered to by the Union of Soviet Socialist Republics. The Proclamation called upon Japan to surrender unconditionally and stated in article ten:

> We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners...

Under the authorization conferred by an Imperial Proclamation,[72] Japanese representatives signed the Instrument of Surrender[73] in Tokyo Bay on September 2, 1945. By the Instrument of Surrender the Japanese representatives, on behalf of the Emperor of Japan, the Japanese Government, and the Japanese Imperial General Headquarters, accepted the provisions set forth in the Proclamation issued on July 26, 1945, at Potsdam and stated:

> We hereby command all civil, military, and naval officials to obey and enforce all proclamations, orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority....
> We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration.

The International Military Tribunal for the Far East was established by Special Proclamation of the Allied Supreme Commander in the Pacific dated January 19, 1946.[74] After alluding to the July 26 Proclamation at Potsdam and the Instrument of Surrender signed by Japan and reciting his authority as Allied Supreme Commander, General MacArthur, in his Proclamation provided:

> Article 1. There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against peace.
>
> Article 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

The Charter of the International Military Tribunal for the Far East,[75] as amended slightly on April 26, 1946, provided for a Tribunal composed of not less than six nor more than eleven members appointed by the Supreme Commander for the Allied Powers from names submitted by Signatories to the Instrument of Surrender plus India and the Philippines. The officers of the Tribunal and the general procedure to be followed were provided for in Section I, trial safeguards for the accused in Section III, powers of the Tribunal and trial procedure in Section IV, and provisions for findings and sentencing in Section V. Section II set forth the jurisdiction of the Tribunal and other general provisions. It stated in article five:

> The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
> a. Crimes against Peace ...
> b. Conventional War Crimes ...
> c. Crimes against Humanity ...

Nine members of the Tribunal were appointed, pursuant to the Charter, on February 15, 1946, and two additional members from India and the Philippines were appointed later. Each of the Governments of the States whose nationals were members of the Tribunal appointed prosecuting counsel, and an indictment signed by those counsel was served on twenty-eight defendants and filed with the Tribunal on April 29, 1946.[76] The Tribunal convened formally for the first time on May 3, 1946, and pronounced judgment on November 4-12, 1948. Of the twenty-eight defendants, two died during the trials, and one was unable

to plead because of insanity. All of the remaining twenty-five defendants were found guilty of one or more counts of the indictment. Seven were sentenced to death; sixteen, to life imprisonment; one, to twenty years imprisonment; and one, to seven years imprisonment.[77]

### 3. Municipal Tribunals

Even before the end of World War II, several nations undertook to try individuals in municipal tribunals for alleged violations of the laws of war. The Germans initiated proceedings against some Allied prisoners of war, and both the United States and the Soviet Union conducted war crimes trials while hostilities were still in progress.[78] After the war had ended, the Allied Powers conducted many war crimes trials in municipal tribunals. Some were permanent courts and others, ad hoc; some were civilian courts and others, military.[79]

Various theories of jurisdiction were invoked as authority for these trials and for war crimes legislation enacted by the Governments of the Allied Powers. The continental European war crimes courts were usually based on municipal penal statutes and were required to limit jurisdiction to that provided by the statute. The statutes generally relied on the territoriality, passive personality, and protection of interests theories of jurisdiction.[80]

The United States, British, and Commonwealth tribunals were not bound by municipal penal statutes and exercised even wider jurisdiction than the courts of the continental countries, tending toward the theory of universality. These tribunals frequently did not limit jurisdiction due to the geographic location of the prohibited act, the time the act was committed, the nationality of the victim, or the nationality of the accused. In addition, the Allied Powers tried and punished by courts-martial members of their own armed forces accused of acts that were prohibited by municipal military law as well as the laws of

war.[81]

A distinct "hybrid" type of tribunal was permitted by Allied Control Council Law No. 10 promulgated by the four major Allied Powers in Berlin on December 20, 1945.[82] The Law referred to and incorporated the Moscow Declaration of October 30, 1943, and the London Agreement of 8 August 1945 and set out the same general acts as crimes as the Charter of the International Military Tribunal at Nuremberg. The Law detailed the relationship of the International Military Tribunal at Nuremberg to the Tribunals allowed under the Law and stated in Article III:

> 1. Each occupying authority, within its Zone of occupation,...
> d) shall have the right to cause all persons so arrested and charged and not delivered to another authority, as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality or stateless person, be a German court, if authorized by the occupying authorities.
> 2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

Based on the above Law, the Commander of the United States' zone of occupation in Germany issued Ordinance No. 7 [83] on October 18, 1946, which, as slightly amended on February 17, 1947, established United States Military Tribunals to try additional German war criminals. The jurisdiction of the tribunals was set out in Article I:

> The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established for the trial of any such offenses.

Provision was made for the procedure to be followed, for the powers of the tribunals in sentencing, and for other matters. It was stated specifically

that the findings of the International Military Tribunal at Nuremberg were to be final in certain types of cases.[84]

Twelve trials were held at Nuremberg by the United States Military Tribunals, beginning on October 26, 1946, and ending on April 14, 1949. Of one hundred eighty-five individuals indicted, one hundred seventy-seven were tried, resulting in one hundred forty-two convictions and thirty-five acquittals. Of those convicted, twenty-four received death sentences; twenty, sentences to confinement for life; and the remainder, sentences to lesser periods of confinement.

The French also used Law No. 10 as authority for French Tribunals in their sector of Germany. The British set up a German Tribunal and the Soviet Union did not use the Law at all.[85]

The distinctive feature of the United States Tribunals was that they were established under international authority and used international law but were staffed by United States' judges and used United States' procedure. In this respect, they differed from both international tribunals and purely municipal tribunals.

The treaties of peace with other Axis Powers were concluded by the Allied Powers on February 10, 1947. Only the treaty with Italy contained war crimes provisions. Article forty-five required Italy to apprehend and surrender for trial to any requesting United Nations Government persons accused of war crimes and any available witnesses to the crimes.

### a. Israeli Trial of Eichmann

Throughout the Allied war crimes trials the name of Adolph Eichmann kept cropping up in connection with the systematic Nazi murders in Germany and Austria of large numbers of individuals. Many of the individuals were classified by the Nazis as "Jews", "Poles", "Gypsies", "Slavs", and "Ukranians".

Other individuals were murdered without being specifically designated as belonging to an undesirable group.[86] Prior to the 1945 collapse of Germany Eichmann fled to Argentina, entering that country under a false identity and apparently illegally. Through his wife, who eventually joined him in Argentina, Eichmann was tracked down and captured by a group of Israelis in Buenos Aires on May 10, 1960. After a few weeks of captivity in a private home in Buenos Aires, he was flown to Israel.

Upon his arrival in Israel, Eichmann was charged under an Israeli statute, the Nazis and Nazi Collaborators (Punishment) Law 5710 (1950), on fifteen counts.[87] The offenses charged were grouped into four primary categories: crimes against the Jewish people; crimes against humanity; war crimes; and membership in hostile organizations. Eichmann was convicted by the Israeli trial court and sentenced to death. He was executed on May 31, 1962, after his appeal to the Supreme Court of Israel and his plea for clemency to the President of Israel were both denied.

Argentina complained to the Security Council of the United Nations soon after the abduction and before the trial. Argentina denounced the abduction as a violation of its territorial sovereignty but did not ask for the return of Eichmann. Israel and Argentina issued a joint communique on August 3,1960, by which the two Governments resolved to regard the incident as closed but recognized that the Israeli actions had infringed upon the fundamental rights of the State of Argentina.

There is no doubt that the actions of the Nazis in their attempt to liquidate those they considered undesirable constitutes one of the darkest chapters in human history. The evidence is also very strong that Adolph Eichmann took an active and willing part in those actions. Yet, the trial of Eichmann has given rise to serious doubts about the jurisdiction of the Israeli court. Eichmann was tried under a statute not in effect at the time

the acts in question were committed. The statute was enacted by the legislative body of a nation not in existence at the time the acts were committed. Eichmann was not and had never been a national of Israel. Since Israel was not a state at the time of the acts, the victims could not have been nationals of Israel at that time, although some of the survivors later became nationals of the new state. None of the alleged acts took place within the territory which later became the State of Israel. The Israeli courts did not base their jurisdiction on the territoriality or nationality theories of jurisdiction, nor did they mention the passive personality principle. What the trial court did mention were the theories of universality and protection of interests.

The universality theory had been used extensively in the trials immediately following World War II and would seem to be a legitimate basis for the Israeli courts on all categories of charges except crimes against the Jewish people. In fact, the rationale of that category of charges is difficult to understand at all. The trial court stated in regard to those charges: "It is superfluous to add that the 'crime against the Jewish people', which constitutes the crime of 'genocide', is nothing but the gravest type of 'crime against humanity' .... Therefore, all that has been said in the Nuremberg principles about 'crimes against humanity' applies a fortiori to 'crime against the Jewish people' ...."[88] This explanation is either the result of erroneous legal analysis or the cover for ulterior political motives.[89] In the legal sphere, the basis of the universality theory is that the act is a crime against all of humanity, not just one religious group.

The claim of jurisdiction based on the protection of interests principle is much more tenuous. The trial court, in essence, held that it had jurisdiction because some of the victims of Eichmann were adherents of the Jewish religion and that any harm to such adherents, wherever located, was a threat to the State of Israel.[90] This was the holding even though the acts in ques-

tion took place before there was a State of Israel.

Other questions have been raised about the jurisdiction of the Israeli courts because of the abduction of Eichmann from Argentina and certain provisions of the Genocide Convention, which was in effect and to which Israel was a party. Regarding the abduction question, the trial court properly held that the abduction was an international wrong against the State of Argentina but did not affect its competence to try the individual.[91] It has been previously noted that Israel and Argentina had reached agreement on the international question before the trial began and that Argentina had not asked that Eichmann be returned.

The Genocide Convention,[92] in Article IV, provides that persons charged with genocide will be tried by a competent tribunal in the state where the act was committed unless there is an international tribunal with jurisdiction. At least some of the crimes with which Eichmann was charged constituted crimes of genocide under the Convention. The trial court excluded the Convention on the ground that it only applied to crimes of genocide committed in the future, and therefore was not applicable to the acts committed by Eichmann.[93] A close reading of the Convention does not compel such a conclusion. A better argument would seem to be that the Convention provision is not exclusive and that crimes of this type and magnitude should not require a territorial link to provide jurisdiction. An analogy could be drawn to the universality of jurisdiction provisions of the Geneva Conventions of 1949.[94] Those Conventions also define as grave breaches, subjecting violators to universal jurisdiction, several acts which could be construed as crimes of genocide.

The Israeli court seems to have been on firm jurisdictional ground in trying Eichmann on all charges except those dealing with the "Jewish people" concept. None of the traditional theories of jurisdiction are authority for his trial on such charges. Indeed, the acts alleged could have been charged

as crimes against humanity and the universality principle of jurisdiction properly cited for authority.[95]

b. Continuing Preoccupation of the Soviet Union with War Crimes Trials

By the end of the 1950's most of the nations of the world were trying to forget the atrocities of World War II. The municipal war crimes trials had ended, with the exception of the Eichmann trial, everywhere except in the Soviet Union. The Soviet Government was continuing to investigate alleged collaborators and war criminals and to bring them to trial. Both the investigations and the trials, which continued until at least 1970, received extensive press coverage in the official Soviet newspapers.

Most of the Soviet war crimes' activity involved Soviet citizens who allegedly collaborated with the Germany army in committing war crimes.[96] At least one celebrated case, however, dealt with a woman who was accused of collaboration alone and probably was not a war crimes trial in the international sense.[97] The trials that were reported were sometimes before civilian tribunals and sometimes, before military tribunals, but the sentences were uniformly stiff. It was stressed in some reports that the acts involved had been committed within the territorial limits of the Soviet Union, but statements from official sources which were reported in the press indicated the acceptance of theories of jurisdiction other than territoriality.[98] In conjunction with reporting the investigations and trials, the Soviet press kept up a constant stream of criticism of the Federal Republic of Germany, the United States, and other western Governments for not extraditing alleged war criminals for trial in Soviet courts.[99] The criticism grew particularly virulent when the Government of the Federal Republic of Germany announced in 1965 that it considered that the statute of limitations would run on World War II war crimes effective May 8, 1965.[100] In this connection, there was extensive press

coverage of the Soviet ratification of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[101]

### 4. The Genocide Convention of 1948

The General Assembly of the United Nations began discussions of the problem of genocide on November 9, 1946, at the request of the delegations from Cuba, India, and Panama.[102] A draft resolution accompanied the request. Other states submitted drafts, and various committees of the United Nations discussed the drafts and prepared additional proposals. The universality theory of jurisdiction was defeated in committee by the major powers, including the United States and the Soviet Union. The delegates stated that the political nature of genocide would not lend itself to such broad jurisdiction.[103] The Soviet delegates took an active part in all committee discussions and, while supporting the need for a genocide convention, consistently opposed any type of international court with jurisdiction to punish offenders.[104]

A draft convention was finally prepared, and the text was unanimously adopted by the General Assembly, without abstentions, on December 9, 1948. A number of states signed almost immediately, and the convention went into effect on January 12, 1951. It has never been ratified by the United States.

The Convention, after declaring genocide a crime under international law, defined genocide broadly and specifically stated that the acts described constituted genocide whether committed in time of peace or war.[105] Also punishable were conspiracy to commit genocide, direct and public incitement to commit genocide, attempting to commit genocide, and complicity in genocide.[106] Provisions for sanctions against violations of the Convention were contained in articles four through nine, as follows:

> Article IV. Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private in-

dividuals.

Article V. The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI. Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII. Genocide and other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII. Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the acts enumerated in article III.

Article IX. Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

The Soviet Union ratified the Convention on May 3, 1954, followed shortly by other Communist Governments. The Soviet Union and other Communist Governments made two identical reservations to the Convention. One did not concern sanctions, but regarding article nine, it was stated:

> The Soviet Union does not consider as binding upon itself the provisions of article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Soviet Union will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

## C. THE GENEVA CONVENTIONS OF 1949

Both before and during World War II the necessity for revising and extending the various conventions regulating the conduct of warfare was apparent. On February 15, 1945, the International Committee of the Red Cross notified governments and national Red Cross societies that it intended to undertake that task. The Committee set about assembling as much data as possible. Much information was contained in the extensive records of the Red Cross itself. Other data came from the files of governments and national Red Cross societies of former belligerent countries and from neutral countries, especially those which had acted as Protecting Powers. Other information came from national and international relief organizations and from individuals such as former prisoners of war, camp physicians, and spokesmen. All this information had to be systematized and analyzed before it became useful.

The International Committee convened a Commission of Experts in Geneva in October, 1945. It had a limited scope and was comprised of the neutral members of the "Mixed Medical Commission" instituted by the 1929 Prisoners of War Convention. This Commission of Experts revised treaty clauses within its area of expertise. The second Commission of Experts was formally entitled the "Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various Problems relative to the Red Cross". This meeting, attended by one hundred forty-five delegates representing fifty countries, was convened in Geneva by the International Committee and sat from July 26 to August 3, 1946, studying various proposals. Several months later seventy official representatives of fifteen countries met in Geneva to review the work of the Red Cross. This meeting was called a "Conference of Government Experts for the Study of the Conventions for the Protection of War Victims". While sitting from April 14 to 26, 1947, the Conference considered the preliminary work of the Red Cross and drafts submitted by several governments. Before

adjourning, the Conference adopted amendments to the existing Geneva Conventions and established a preliminary Draft Convention for the Protection of Civilians in Time of War.[107] Opinions of governments which were unable to send delegates to the April conference were solicited, and several sent representatives to Geneva to discuss the work to date with the International Committee. Subsequently, the International Committee submitted all of the proposals to a special Commission of Red Cross Societies which sat in Geneva on September 15 and 16, 1947. This Commission approved of the drafts as a whole, but appended several suggestions. After further consultations with interested groups, the International Committee completed the Draft Conventions[108] and issued them in May, 1948, to all governments and national Red Cross Societies.

The Seventeenth International Red Cross Conference, attended by the representatives of fifty governments and fifty-two national Red Cross societies, met in Stockholm from August 20 to 30, 1948. Subject to a few amendments, the Conference adopted the Draft Conventions submitted by the International Committee. The Conference also invited all states to meet as soon as possible in diplomatic conference for the adoption and signature of the approved texts.[109]

The Draft Conventions adopted by the Stockholm Conference were used as the exclusive working documents for the "Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of the War" convened in Geneva by the Swiss Federal Council, as trustee of the Geneva Conventions. The Diplomatic Conference, which met from April 21 to August 12, 1949, was attended by the representatives of sixty-three governments. Fifty-nine governments were represented by delegations with full voting powers, and four by observers. Under the chairmanship of M. Max Petitpierre of Switzerland the Conference established four primary committees which sat simultaneously and considered respectively: (1) the First Geneva Convention and the Second which adapted it to Maritime warfare, (2) the Prisoners of War Convention,

(3) a Convention for the protection of civilians, and (4) provisions common to all four Conventions. There were also many working parties and, near the end of the Conference, committees for co-ordination and drafting met in an effort to achieve maximum practical uniformity in the texts. At the close of the Conference on August 12, 1949, the assembled delegates adopted and opened for signature the four Geneva Conventions of 1949.[110]

### 1. Provisions Relating to Penal Jurisdiction

The particularly ruthless practices of certain belligerent powers during World War II and the widespread violation of the laws of war, both customary and conventional, focused the attention of the world on the necessity for more effective sanctions against violators. The many war crimes trials conducted in the immediate post-war period, while undoubtedly supported by the great majority of the people of the world, raised questions in the minds of many thoughtful people about the propriety of such ad hoc procedures.

The International Committee of the Red Cross was of the opinion that any future international conventions on the laws and customs of war must include very strict provisions for the repression of violations. Pursuant to its opinion, the International Committee broached the matter to the Conference of Experts which met at Geneva in 1946 and 1947. The assembled experts took no action themselves but asked the International Committee to make a more thorough study of the whole problem of sanctions. In 1948 the International Committee submitted the following draft article to the Stockholm Conference:

> The legislation of the Contracting Parties shall prohibit all acts contrary to the stipulations of the present Convention.
> Each Contracting Party shall be under obligation to search for the persons alleged to be guilty of breaches of the present Convention, whatever their nationality, and in accordance with its own laws or with the conventions prohibiting acts that may be considered as war crimes, to indict such persons before its own tribunals, or to hand them over for judgment to another Contracting Party.[111]

At the time of the submission the International Committee stated that it had not had sufficient time to study the question completely and proposed further inquiry. The Stockholm Conference suggested that the International Committee continue its study and submit proposals to a later Conference.

Four government experts were invited to Geneva to meet with the International Committee to make a thorough study of the matter of penal sanctions. The result was a draft of four new articles to be included in each of the proposed Conventions. The partial text of the proposed articles was as follows:

> I. Legislative measures
> The High Contracting Parties undertake to incorporate the present Convention as part of their national law, to ensure the prosecution of any act contrary to its provisions, and to enact provisions for the repression, by criminal penalties or appropriate disciplinary measures, of any breach of the Convention.
> Within two years after the ratification of this Convention, the High Contracting Parties undertake to communicate to the Swiss Federal Council, for transmission to all signatory or adhering States, the laws and other measures adopted in pursuance of this Article.
>
> II. Grave violation
> Without prejudice to the provisions of the foregoing Article, grave breaches of the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction, the competence of which has been recognized by them. Grave breaches shall include in particular those which cause death, great human suffering, or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person, or involve extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.
> Each High Contracting Party shall in conformity with the foregoing Article enact suitable provisions for the extradition of any person accused of a grave breach of this Convention, whom the said High Contracting Party does not bring before its own tribunals.
>
> III. Superior order ...
>
> IV. Safeguards
> The High Contracting Parties undertake not to subject any person accused of a breach of this Convention, whatever his nationality, to any tribunal of extraordinary jurisdiction....[112]

At the Diplomatic Conference of 1949 the question of penal sanctions was referred to the Fourth Committee since it was proposed that the articles be

the same for all four Conventions. There were some objections to considering the draft proposals in that Committee due to the short period of time they had been available for study. The Netherlands delegation adopted the draft proposals as their own and submitted them to the Committee for its official consideration. After much discussion, ten delegations submitted a joint text which, with only slight modifications, was adopted by the Conference.[113]

Each of the four Conventions contain a chapter entitled "Repression of Abuses and Infractions" or a section entitled "Penal Sanctions". Some of the provisions are identical and will be discussed together. Other provisions are slightly different or are not contained in all four Conventions and will be discussed separately.

### a. Articles 49,[114] 50,[115] 129,[116] and 146 [117]

The first article of each Convention dealing with penal sanctions lays the foundation for suppressing breaches of the Conventions. The text, omitting portions dealing with trial procedure, is as follows:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following article....

This common article obligates the ratifying states to do several things: enact necessary penal legislation; search for persons alleged to have committed grave breaches of the Conventions and bring such persons before its own courts or hand them over for trial to another High Contracting Party; and

take measures for the suppression of breaches of the Convention other than the enumerated grave breaches. Although the Conventions, generally speaking, become applicable upon the occurrence of one of the situations listed in common articles two and three, this article is intended to be put into effect in peacetime.

The requirement of enacting penal legislation if current legislation is inadequate is similar to the obligation required of the Parties to the 1929 Geneva Convention in article twenty-nine. As can be seen, the requirement of reporting the actions taken to implement the Conventions which was contained in earlier drafts, was omitted by the Diplomatic Conference in the final draft. The legislation is required to provide sanctions against persons who order grave breaches to be committed as well as persons who actually commit such breaches. There is no reference to the responsibility of those who fail to intervene, in order to prevent or suppress an infraction. Apparently courts could fall back on the general principles of international law as applied in the post-World War II war crimes trials.

The requirement to search for and prosecute offenders implies spontaneous activity on the part of a state becoming aware that a person within its territory has committed a grave breach. The judicial proceedings are required to be uniform in character, whatever the nationality of the accused.

The common article makes an express reservation to the effect that the obligation to extradite is limited by the national laws of the country where the accused is located. The High Contracting Party asking that an accused be handed over for trial must furnish enough evidence of the charges against the accused to make out a prima facie case. Since most extradition treaties do not require the handing over of nationals of the requested state, it would seem apparent that such a state would be required to bring its nationals to trial in its own courts.

The creation of ad hoc tribunals to try enemy nationals accused of committing grave breaches of the Convention appears to be excluded by implication. The common article does not prohibit, however, the trial of an individual before a permanent international penal tribunal if the jurisdiction of the tribunal has been recognized by the High Contracting Parties concerned. The Diplomatic Conference expressly declined to make any decision on this point which might hamper future development of international law.[118]

The third paragraph of the common article dealing with the repression of infractions of the Conventions other than enumerated grave breaches is very vague and open to various interpretations. The French and the English texts do not even correspond exactly.[119] It appears that the primary intention of the Diplomatic Conference was the actual repression of breaches and as a possible secondary consideration, administrative measures to insure respect for the Conventions on the part of the armed forces and civilian populations of the High Contracting Parties. M. Claude Pilloud suggests that national legislation, after providing for the punishment of grave breaches and establishing an appropriate penalty for each, must include a general clause providing for the punishment of other breaches of the Conventions.[120]

### b. Articles 50,[121] 51,[122] 130,[123] and 147[124]

Experts called into consultation by the International Committee of the Red Cross in 1948 first introduced the idea of including a definition of grave breaches in the texts of the various Conventions. It was thought necessary to specify certain serious infractions in order to separate them from minor offenses and provide for universality of treatment in their repression. It was also thought desirable to draw public attention to the more serious infractions as a warning to potential offenders. The texts that were adopted by the Diplomatic Conference for each Convention were basically contained in the joint

amendment submitted by several delegations.[125] The text of the article contained in the First and Second Conventions is as follows:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The article in the Third Convention included everything contained in the First and Second Conventions except the property offenses and adds the following:

> ... compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

The article in the Fourth Convention includes everything contained in the First and Second Conventions and adds the following:

> ... unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages....

The categories of grave breaches are obviously very broad and must be read in the context of the immediate post-World War II times in which they were written. Persons and property covered by these provisions are defined in other articles of the Conventions. Killing must be willful to be considered a grave breach. That limitation would appear reasonable since the Conventions attempt to regulate combat situations. The term "torture" might be open to many different definitions, but the broad coverage of "inhuman treatment" would appear to cover any physical or mental harm willfully and unnecessarily inflicted which does not amount to torture. The provisions concerning property very closely reflect the basic complimentary doctrines of humanitarianism and military necessity.

The prohibition of compelling a prisoner of war to serve in the armed

forces of a hostile Power is reminiscent of article twenty-three of the Hague Regulations of 1907, which forbade a belligerent from forcing the nationals of an enemy Power to participate in actions directed against their own country.[126] One clause of the article appearing in the Third and Fourth Conventions raises the violation of the rules of fair trial, contained in other articles of the Convention, to the status of a grave breach. This was undoubtedly due to the particular vulnerability of prisoners of war and civilians to punishment in sham judicial proceedings.

The special prohibition in the article contained in the Fourth Convention concerning unlawful deportation or transfer is a direct result of the experiences of World War II and refers to breaches of articles forty-five and forty-nine of that Convention. Unlawful confinement of civilians is a particularly serious problem during the occupation of a country by the armed forces of a hostile Power and is included as a grave breach. The taking of hostages is a common technique of guerilla forces as well as other groups and was included as a grave breach because of the helplessness of the victims and the anguish caused their families.[127]

### c. Articles 52,[128] 53,[129] 132,[130] and 149 [131]

The Geneva Convention of 1929 contained provisions providing for an inquiry into alleged violations of the Convention. It was necessary, pursuant to those provisions, that the parties to a conflict agree on the procedure for any inquiry. It was obvious that the application of such a provision would be difficult and that some automatic procedure should be provided. The problem was considered in detail by a Commission of Experts convened by the International Committee of the Red Cross in 1937 and by the Sixteenth International Red Cross Conference which met in London in 1938.

At the Conference of Government Experts held in Geneva in 1947, the Inter-

national Committee made several recommendations concerning inquiry procedure which was a result of the earlier studies. Among the more important recommendations was one that a permanent authority be entrusted with the nomination of the whole or part of any Commission of Inquiry. The Government Experts preferred that the members of such a commission be appointed by the President of the Court of International Justice. After further study, the International Committee submitted the following text to the 1948 Stockholm Conference:

> ... any High Contracting Party alleging a violation of the present Convention may demand the opening of an official enquiry. This enquiry shall be carried out as soon as possible by a Commission instituted for each particular case, and comprising three neutral members selected from a list of qualified persons drawn up by the High Contracting Parties in time of peace, each Party nominating four such persons. The plaintiff and defendant States shall each appoint one member of the Commission. The third member shall be designated by the other two and should they disagree, by the President of the Court of International Justice or, should the latter be a national of a belligerent State, by the President of the International Committee of the Red Cross. As soon as the enquiry is closed, the Commission shall report to the Parties concerned on the reality and nature of the alleged facts, and may make appropriate recommendations....

With only one minor alteration by the Stockholm Conference, the text was submitted to the Diplomatic Conference in 1949. The matter was referred to the Fourth Committee of the Conference since it was intended that a common article be prepared. The fourth Committee and its subsidiary working bodies believed the procedure proposed was too complicated and would be unworkable in practice.[132] The alternate article proposed by the Fourth Committee was approved by the Conference without discussion and included in all four Conventions. The final draft states:

> At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

It is clear that an inquiry is compulsory once one of the belligerents has asked for it. It is equally clear that the belligerents concerned must reach agreement on the procedure for the inquiry. As stated above, these provisions were also in the 1929 Convention and apparently were never used.[133] It is not difficult to understand why. It is very difficult to secure any kind of agreement between states in time of war. The problem is compounded when it is a question of investigating an offense which one of them is alleged to have committed and perhaps allowing within that state ad hoc investigators.

The second paragraph of the common article attempts to solve the problem of agreement but only seems to move the problem to another area. The common article does not provide for any further action if the belligerent states cannot reach agreement on the appointment of an umpire.

Paragraph three is taken from the 1929 text. It requires that an end be put to any violations ascertained and that they be repressed without delay. In the context of the Conventions, repression is taken to mean penal action in accordance with the articles previously discussed.[134]

### d. Article 54 [135]

In article fifty-three of the First Convention are found regulations concerning the use of the emblem or the designation "Red Cross" or "Geneva Cross". Article fifty-four is designed to insure prevention of violations of those regulations so far as possible and to punish those individuals who do violate them. The text is short and to the point:

> The High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression, at all times, of the abuses referred to under Article 53.

This provision could have been incorporated in article forty-nine of the First Convention as was suggested at the Diplomatic Conference. The Committee responsible for the subject apparently overlooked enforcement of article

fifty-three until after article forty-nine had been adopted. Article fifty-four was then drawn up as a separate article to avoid re-opening discussion on article forty-nine. Procedures for the enforcement of the regulations contained in article fifty-three are particularly important since the 1949 Conventions substantially increased the authorized uses to which the emblems can be put and thus rendered them more vulnerable than before.

## 2. Acceptance and Implementation

Within a few years most of the states in the world had ratified or acceded to all four Conventions. Although there are several reservations to various articles, the only one with particular bearing on the subject of this paper is a reservation by the Soviet Union and other communist governments to article eighty-five of the Prisoners of War Convention. That article provides that prisoners of war are to retain the benefits of the Convention even if they are convicted by the Detaining Power for acts committed prior to capture. The Soviet Union and its followers refused to agree to apply that article in the case of prisoners of war convicted or war crimes and crimes against humanity as defined and used by the International Military Tribunal at Nuremberg.[136]

The first and one of the most important obligations of the Parties to the 1949 Conventions is to enact necessary legislation to provide effective penal sanctions to enforce the Conventions. It is left up to the individual nations to determine, at least in the first instance, whether any additional legislation is necessary. In view of the theory of universality of jurisdiction espoused in the Conventions, it would appear necessary for the great majority of states to enact additional penal laws to comply with the minimum requirements of the Conventions.[137]

At least eight signatory states -- the Netherlands, Switzerland, Yugoslavia, Czechoslavakia, Belgium, Ethiopia, Thailand, and the United Kingdom --

have enacted specific legislation to implement the Conventions. Other nations, including the United States, have considered their legislation adequate to fulfill the obligations incurred by ratifying the Conventions.[138] The United States' position in this regard is rather difficult to understand. The universality of jurisdiction provisions of the Conventions are not self-executing, and most federal and state penal statutes are limited to acts committed within the territorial boundaries of the United States or of the state concerned. The Uniform Code of Military Justice [139] is a theoretical means for repression of war crimes regardless of the situs of the act or the status of the actor. As a practical matter, however, the jurisdiction of military courts has been reduced in recent years both as to acts and actors.[140] Although the jurisdiction of courts-martial under the laws of war ante-date the United States Constitution and is on firmer constitutional ground than legislation enacted pursuant to Congressional power,[141] it appears questionable whether the United States should rely on current military law to fulfill its obligations under the Conventions.[142]

## III. POSSIBILITIES FOR THE EXERCISE OF JURISDICTION UNDER CURRENT CONDITIONS

The five traditional theories on which states usually have based claims to jurisdiction over individuals have been discussed. There is no question but that territoriality and nationality have been the theories most commonly relied upon and most commonly accepted by other states. The relaxed attitude toward the trial of pirates has been cited as an early example of the universality principle. While there may have been universality and passive personality concepts involved, the peculiar nature of the act of piracy and particularly the fact that it usually occurred on the high seas where there was no effective sovereign power detract from its value as a precedent.

The conferences beginning in the middle of the nineteenth century and

continuing nearly until World War I and the resulting conventional international law relied on states to punish their own nationals who violated the laws of war. The same may be said of the Geneva Convention of 1929. The real genesis, in practice, of the idea of an international tribunal to try war criminals was in the work of the special Commission appointed by the Versailles Peace Conference to make recommendations concerning the trial of the war criminals of World War I. The Commission expressed a view of customary international law based on the passive personality and universality theories of jurisdiction and recommended an international tribunal for the trial of major war criminals. The final version of the Versailles Treaty contained provisions for an international tribunal. All this planning came to naught as the German Government prevailed with arguments for German trials at Leipzig which could be based on the territoriality and nationality theories of jurisdiction. It is unknowable, of course, whether stiff penalties meted out by Allied or international tribunals after World War I would have deterred in any way the atrocities of World War II.

The real watershed in the history of penal jurisdiction over war crimes was the aftermath of World War II. There were three basic types of tribunals used: the International Military Tribunals at Nuremberg and for the Far East, the United States Military Tribunals at Nuremberg, and the many Municipal Tribunals.

The jurisdiction of the International Military Tribunals could be construed as a pooling of the competence of the various Allied Nations and based on the territoriality, protection of interests, and passive personality principles. On the other hand, jurisdiction could have been based on the legislative power of the Allies as successor sovereigns to the German and Japanese Governments -- the traditional territoriality and nationality theories. Another possibility, of course, would be the universal competence of properly

constituted tribunals to try individuals for acts such as those concerned.

The jurisdiction of the International Military Tribunals was based on their Charters, but that begs the question since the Charters resulted from the London Agreement. It appears that the main basis of the jurisdiction of the International Military Tribunals was the theory of universality. In this regard, it should be remembered that the four major Allied Powers purported to be acting for all the United Nations; that twenty-three nations joined in the indictment at Nuremberg; that the Charter and Judgment of the Tribunal at Nuremberg were ratified by the General Assembly of the United Nations by resolution; and that the basic principles of the Charter of the Tribunal at Nuremberg were used in the Charter for the Tribunal at Tokyo as well as for the Charter of the United States Military Tribunals at Nuremberg.

The jurisdiction of the United States Military Tribunals at Nuremberg also relied on a basic document which, in turn, was based on permissive enactments by the four occupying Allied Powers in Germany. The same comments made concerning the Charters of the International Military Tribunals are applicable in the case of the United States Tribunals, with possibly more stress on the legislative powers of sovereign argument.

The Municipal Tribunals relied on all five theories of jurisdiction . The common law countries tended more toward universality, while the civil law countries were tied more closely to municipal statutes and relied more heavily on the principles of territoriality, nationality, and passive personality.

The trend from World War I through the aftermath of World War II was definitely toward broader competence of tribunals to try war criminals and a tendency toward international tribunals. This was based almost entirely on customary international law. The tribunals themselves often were reluctant to specify the basis of their jurisdiction, but the practice tended toward an expanded concept of passive personality amounting to universality of juris-

diction, particularly in the trials after World War II. The Geneva Conventions of 1949 provide for universality of jurisdiction in municipal tribunals of the High Contracting Parties for grave breaches of the Conventions. This competence is certainly wider in theory than that included in any previous convention.

The current political and legal organization of the world raises grave doubts of the practicality of using this competence to actually deter violations of the laws and customs of war. The United Nations has been a disappointment to most observers due to its inability to maintain peace or move the nations of the world toward consensus in determining major problems and possible solutions. The substantial paralysis of the United Nations is really just a reflection of the ideological differences -- political, legal, and economic -- separating the communist nations of the world, partiuclarly the Soviet Union, from the non-communist nations. To this dichotomy must now be added the gulf between the developed nations and the underdeveloped or undeveloped nations.

The limited warfare of the nuclear era is another important factor. It does not lend itself to the clear "good guy-bad guy" situation of World War II, nor to clear-cut victory for one side or the other. As a result, states with a motive for prosecuting non-nationals are unlikely to have physical custody for trial. If custody is obtained, political considerations usually make it more advantageous to make some disposition other than criminal prosecution. The remainder of this paper will discuss these conditions in more detail and explore their effects on the exercise of jurisdiction by international and municipal tribunals.

## A. EFFECTS OF THE LACK OF AN IDEOLOGICAL CONSENSUS IN THE WORLD

Ideological consensus is not necessary for agreement between nations as to the existence of a problem or methods of solving it. A common interest among nations is usually sufficient for joint or parallel action. There is no

denying, however, that the lack of a common approach to situations makes the task of identifying common interests very difficult.

### 1. Political Incompatibility

Political conflict between the Soviet Union and the non-communist nations has been a constant fact of international life since 1917. The Soviet Union cooperated with the Allied Powers during World War II despite that conflict and because of an overriding common interest in defeating the Axis Powers. Soon after the end of World War II it became apparent that the conflict would intensify and that the Soviet Union would be joined by its satellite countries and later by China. Experience in the United Nations, as well as bi-lateral and multi-lateral contacts between communist and non-communist nations, has shown that very strong common interests are necessary to override national or ideological political interests.

The concept of state sovereignty is difficult to overcome in any situation requiring international cooperation. This is particularly true in an area as politically charged as war crimes trials. Accusations of violations can, and often do, reach to the highest levels of government. Even the trial of lower-ranking members of armed forces by another nation is not looked upon with favor by the country of nationality. States have simply not allowed such trials if in a position to resist, even if parties to international conventions granting such jurisdiction.

The Soviet Union, in particular, maintains a very conservative and traditional view of state sovereignty. Although Tsarist Russia had participated fully in the international conferences of the late nineteenth and early twentieth centuries, the Communist regime was on the defensive about international law from the beginning and would not tolerate any international interference in what it considered domestic affairs. Even after the Soviet Union became

established as a state, the nature of the authoritarian government made its leaders extremely wary of any decision-making process which they could not control. Since the major post-World War II trials Soviet actions have been marked by lip service to broad jurisdictional bases so long as the forum is a municipal tribunal instead of an international one.

It would be unfair to castigate the Soviet Union too severely for using international law, including the part concerned with jurisdiction over war crimes, as a way of achieving political goals or maximizing political benefits. All nations are so inclined, although the Soviet leaders have been more blatant in their actions. It is interesting to note in this regard the reaction of the United States Government to an announcement by the Government of the Democratic Republic of Vietnam (DRV) in July, 1966.[143] In that announcement the Hanoi Government expressed its intention to try American aviators held by the DRV for war crimes. It was contended that these aviators had attacked civilian targets and that such attacks constituted war crimes. The precedents for claiming that the attacks constituted war crimes are not very solid. In addition, the DRV was claiming that the Americans were not prisoners of war and were not entitled to the benefit of the fair trial provisions of the Third Geneva Convention. After a short but intensive United States diplomatic offensive, resulting in the intervention of international figures from all over the world,[144] the Hanoi Government backed down on its plans for trials.

Although the United States reaction was partially based on the statements of the DRV indicating that the Americans were already considered guilty and would not receive a fair trial, the major cause of the United States position seems to have been a marked reluctance to allow American military men to be tried by a foreign enemy nation. It is true that the DRV was probably wrong on the substance of international law relied upon and probably intended to violate the provisions of the Third Geneva Convention concerning fair trials.

Nevertheless, in a strictly legal sense, the DRV had the right to try the prisoners as war criminals. If, as a result of the trials, there were violations of the Geneva Conventions by individuals subject to them, then such individuals would be subject to trial. It is submitted, however, that there are few nations that would not have reacted as the United States did in this case if they had the power and influence to do so.

The reasons of both the DRV and the United States were political and practical, although couched in legal terms. The Hanoi Government wished to bring pressure on the United States to stop the bombing and if possible disengage itself from the war in Southeast Asia. The proposed war crimes trials were undoubtedly seen as a way to enlist world public opinion and United States public opinion in aid of the political and military goals of the DRV. Whether the alleged attacks by American aviators constituted war crimes made little difference from a political point of view and the concept of a fair trial, even if understood, would not be allowed to hinder the primary purpose of political propaganda.

On the United States side, it was obvious that the DRV had no intention of conducting impartial trials in the western sense. It was also probable that the American aviators would be executed immediately after such trials and before public opinion would have a chance to have much effect on Hanoi. Finally, as a practical matter, the United States Government knew that if violations of fair trial standards occurred there would be no trial of the perpetrators because no one with a motive for prosecution, political or otherwise, would have physical custody of them.

The non-aligned nations add another factor to the political climate. Many of their leaders do not feel bound by customary international law, including the law of war, since they had no part in shaping it. Many of these so-called "third world" countries have become quite adroit at playing the

communist world against the non-communist world in order to secure political and economic advantage. The major communist and non-communist countries, particularly the Soviet Union, China, and the United States, seem perfectly willing to deal with these countries on a purely political basis and not push for adherence to international law.

The time may be rapidly approaching when the nations of the world, and particularly the smaller nations, find it in their self-interest to adhere more closely to some form of international law. It may be, as will be discussed later, that the substantative law of war will have to be changed to reflect changed conditions, both political and military. If such changes will help create the perceptions of self-interest necessary for adherence by nations of diverse political goals, they will be well worth the effort.

### 2. Legal Incompatibility

Mingled with the political concepts and interests discussed in the previous section, but clearly distinguishable, are legal concepts varying from country to country. Each political society has its own law, and in many cases several laws co-exist in the same nation. This diversity is another factor affecting the possibilities of exercising criminal jurisdiction over war crimes.

It is possible to detect, beyond the wide variations among particular laws, the existence of a few general categories within which these different laws can be grouped.[145] These general categories are characterized by the way the group defines and uses the idea of law. When trying to determine the families into which different laws can be grouped, consideration must be given to the more constant general elements rather than the less stable rules found in the law at any given moment. Two criteria are deemed most important by David and Brierly:

> Two considerations seem equally decisive for the purposes of classification. From the technical standpoint, it is advisable to ask whether

> someone educated in the study and practice of one law will then be capable, without much difficulty, of handling another. If not, it must be concluded that the two laws do not belong to the same family; this may be so because of differences in the vocabularies of the two laws (they do not express the same concepts), or because the hierarchy of sources and the methods of each law differ to a considerable degree. This first criterion, no matter how essential, is nevertheless insufficient, and it must be complemented by a second consideration. Two laws cannot be considered as belonging to the same family, even though they employ the same concepts and techniques, if they are founded on opposed philosophical, political or economic principles, and if they seek to achieve two entirely different types of society. These two criteria must be used cumulatively, not separately.[146]

It is generally accepted that there are three major systems or families of law in the world today -- the Romano-Germanic, the Common, and the Socialist -- as well as several philosophical or religious systems which are not "law" in a strict, narrow sense.

The Romano-Germanic family includes those countries in which the system of laws developed on the basis of Roman law as interpreted by the medieval scholars.and changed by Germanic tribal custom. The rule of law is conceived as a rule of conduct intimately linked to ideas of justice and morality. The Romano-Germanic family of laws originated in Europe and evolved, primarily for historical reasons, as an essentially private law, regulating the relationships between individual citizens. Other branches of law developed later but the private law remains the main branch of legal science.

Through reception, either voluntary or forced, the Romano-Germanic family of law has come to be applied in many countries. Outside of Europe these laws have their own characteristics. In some instances the receiving country possessed its own advanced civilization and some of the original institutions were kept. In any event, old ways of acting and thinking meant that the application of the new law was quite different from that followed in Europe.

The Common Law includes the law of England and those laws modeled on English law. Superficially at least, there are many differences between Common Law and Romano-Germanic Law. The Common Law was and is formed primarily

by judges in resolving individual disputes. It seeks to provide the solution to a trial rather than to formulate a general rule of law for the future. It is remedy-oriented and tends to be less abstract than the Romano-Germanic family. Public law plays a much more important role in the Common Law. It was developed as a system for the restoration of peace in those cases where the peace of the English kingdom was threatened, or when some other important event required or justified the intervention of royal power.

As is the case with the Romano-Germanic family, the Common Law has expanded considerably throughout the world as a result of reception and has suffered the same fate of mutation when transferred to alien soil. Local practice has actually had more of an impact on the Common Law than the Romano-Germanic Law since the Common Law is not normally codified and relies more on the experience of judges and a developing body of case law.

The laws of the communist countries, usually called Socialist Law, make up the third family, more or less distinct from the other two. The communist countries all had laws belonging to the Romano-Germanic family prior to communism and still have some characteristics of Romano-Germanic Law. The family of Socialist laws originated in the Soviet Union and spread to countries in Eastern Europe and Asia as the political influence of the Soviet Union expanded. Socialist law in the peoples republics of Europe still retains more Romano-Germanic characteristics than in the Soviet Union reflecting the more fully developed legal systems present when communism became dominant.

In order to understand Socialist Law, particularly in its purest form as practiced in the Soviet Union, it is necessary to understand the theory of communism.[147] The building of communism is the stated goal of the Soviet Union to which all institutions, including the law, are subordinated. According to the theory, the law directs the economic and social engineering necessary to build communism while maintaining law and order. When the economic

and social engineering is completed the need for law will have passed, permitting it to wither away. Marxism-Leninism provides the rationale for a system of class-oriented legality. Law is considered to be a class weapon serving the interests of the dominant class in every society. The existence of limiting, eternal laws based upon such abstract ethical principles as nature, reason, or justice is rejected.[148] When the proletariat assumes power, it uses law against its class enemies to effect the transition to communism free of the constraints of law and abstract ethics and morality. Lenin expounded this theory clearly:

> Dictatorship is rule based directly upon force and unrestricted by any laws. The revolutionary dictatorship of the proletariat is rule won and maintained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestricted by any laws.[149]
> ...We repudiate all morality taken apart from human society and classes ... We say that our morality is entirely subordinated to the interests of the class struggle of the proletariat. Our morality is derived from the interests of the class struggle of the proletariat.
> ...We say: morality is what serves to destroy the old exploiting society and to unite all toilers around the proletariat, which is building up a new, communist society.[150]

Many Socialist legal institutions are very similar to institutions in other families of law. This results from the fact that there are certain problems and needs which are common to all political societies, and there are practical considerations which militate against radical solutions. Where authoritarian rule and the building of communism do not create special needs, socialist institutions and laws operate much as they do in other continental European countries. This is a reflection of the fact that Socialist Law is really a Romano-Germanic system with a veneer, sometimes thick, of new institutions or changes in traditional institutions resulting from the needs of communist theory and the necessary authoritarian rule.[151]

Aside from the three families of law just discussed, there are several systems of rules effective in the world of a religious or philosophical rather than a juridical nature. The word "law" is used to designate these systems

of rules because they fill the role in certain areas of human conduct, which elsewhere has devolved upon law.

Islamic law is probably the most important of these systems. It is not the law of any Mohammedan state but the sum of rules derived from the Muslim religion concerning human relationships.[152] Muslim law fills the role left vacant in various countries by the rules of other laws, particularly in the regulation of such important kinds of human relationships as the law of persons, the family, and successions. In addition, in countries whose civilization has been molded by Islam, the principles of Islamic Law may sustantially affect the way law received from the West is interpreted and applied in practice.

Other religious-philosophical systems exist in India and the Far East and local customs not rising to the status of systems in Africa. These systems and customs, including Muslim Law, do not appear to have the widespread influence to contribute materially to the legal incompatibility of the world or to its possible solution.

The legal incompatibility which seems to be a major factor affecting the exercise of war crimes jurisdiction is the conflict between the Romano-Germanic and Common Law families on the one hand and the Socialist family on the other. This is undoubtedly influenced to some extent by the political incompatibility of the countries representing communism and those that do not.

The Romano-Germanic and Common Law families have developed side by side over the centuries. Both families grew in the soil of western civilization, and there have been numerous contacts between them. In fact, some political societies have a combination of the two families, which seem amenable to mixing.[153] The methods employed by each family tend to be much alike, and very similar substantive solutions inspired by the same idea of justice are provided by both. This similarity, at least when compared to the concepts underlying Socialist Law, allows us to speak of a Western family of law standing concep-

tually in stark contrast and opposed to the Socialist family.

The attempt at agreement on common legal norms and procedures concerning war crimes has previously been discussed in relation to the London Conference.[154] There the Soviet concept of political expediency as opposed to the western concept of justice propounded by France, Britain, and the United States was clearly visible. The fact that an international tribunal was created more or less along western lines reflected the prevailing balance of power and the Soviet desire to see Germany branded an international outlaw. There seems to be no reason to believe that any of the western concepts rubbed off on the Soviet delegates or that the western delegates were favorably influenced by the Soviet arguments.

Today the balance of power has shifted, and the satellites and adherents picked up by the Soviet Union since World War II give greater weight and influence to the Socialist view. The big question to be answered, so far as war crimes trials are concerned, is whether there is enough common ground between the two sides to allow the exercise of internationally conceded jurisdiction. Armed conflicts in the foreseeable future are likely to involve adherents to both Western and Socialist Law. Unless a functional international tribunal is created or unless ways are found to aid the jurisdiction of municipal tribunals, taking into account the political and legal diversity of the world, the prospects for adequate sanctions against individual violators of the laws of war do not appear favorable.

## B. EFFECTS OF LIMITED WARFARE

In addition to the political and legal problems affecting the exercise of criminal jurisdiction over individual violators of the laws of war, the very nature of warfare as practiced today has a major impact. Even before the advent of nuclear weapons, there was a growing opinion among knowledgeable people that war was not functioning well in the twentieth century in its traditional

role as a method of resolving international conflicts.[155] The development of sophisticated and powerful nuclear weapons and the equally efficient delivery systems available to modern superpowers have succeeded in making unlimited warfare an unacceptable tool of national policy to rational world leaders. Self-interest has dictated the maintenance of such arsenals but at the same time has made the costs of their use unacceptably high. The costs of fighting wars with so-called "conventional" weapons, however, are still considered bearable by most nations, if national self-interest is perceived to be involved to a sufficient degree.

### 1. Characteristics of Limited Warfare

There are at least two general types of limited warfare. One type involves major powers directly opposed to each other or one or more major powers involved in a conflict between smaller countries or non-governmental groups. In either case the major powers are "pulling their punches" in order not to let the situation escalate into an unacceptable unlimited war. The other type of limited warfare involves two or more less powerful countries or groups that are not capable of inflicting the awesome damage possible with modern technology. In this case the belligerents can use all of their resources without endangering the rest of the world militarily. It is quite possible, of course, that a conflict between two or more relatively weak belligerents will be joined by one or more major powers and create a conflict of the type first discussed.

With the exception of the Korean War,[156] pitting the United States and China against each other, and the Cuban missile crisis,[157] involving the United States and the Soviet Union, the major powers have managed to avoid a direct confrontation since World War II. Even these two situations do not really qualify as warfare between major powers. China probably was not capable of exerting more military force than was exerted during the Korean War and should

not be classified as a major military power, at least as of that time. The Cuban missile confrontation seems to have been a much more dangerous situation from a nuclear standpoint since both the United States and the Soviet Union undoubtedly possessed the capability to engulf the world in a catastrophic unlimited war. In that case, however, a "shooting" war never occurred because the Soviet Union backed down in the face of an overwhelming United States' conventional seapower superiority.

The more pervasive type of conflict since World War II and the type which seems more likely to occur in the future is warfare characterized by struggles of various groups for independence or for control of the government of a relatively weak nation. These movements may arise from within the groups involved or may be instigated by the major powers for political or economic reasons. In any case, one or more major powers are likely to become interested and participate to a greater or lesser extent.[158] Experience has shown that this kind of war is fought on political as well as military fronts and involves the total population of the geographical area involved. Guerrilla warfare and the use of terror as a weapon is the usual result.

Successful guerrilla warfare depends on stealth, hit-and-run attacks, and clandestine operations. Many of the substantive provisions of the law of war cannot be observed by guerrillas if they wish to be successful. Indeed, some provisions of the Geneva Conventions of 1949, such as the necessity of wearing a distinctive sign and carrying arms openly in order to be protected by the Prisoners of War Convention would be tantamount to suicide.[159] Other norms of the international law of war, both customary and conventional, such as the treatment of prisoners of war and non-combatants, would appear to be very difficult for guerrillas to abide by.

Irregular warfare also poses serious problems for the forces opposing guerrillas, even if those forces are organized and operate in a more conven-

tional manner. The conventional forces find it very difficult to identify the lawful combatants of their enemy. The guerrillas fight and fade back into the general population only to emerge at another time and another place. The local population often assists the guerrillas, either from sympathy or from fear. The conventional forces usually have superior firepower but are unable to use it effectively because the guerrillas will not stand still to fight pitched battles and have few permanent bases. It is difficult for the conventional forces to know how to treat captured personnel since they normally do not fall into one of the neat categories provided by the traditional law of war.

Finally, this type of limited warfare often does not result in a clear military decision. The complicated political aspects of these conflicts result in tactical and strategic military actions which only vaguely reflect military realities. Political compromise between the belligerents as well as interested third parties tend to produce settlements which leave the situation little changed by the fighting. Warfare of this kind does not seem to be so much a way of resolving international disputes as it is a method of testing relative strengths and weaknesses and the resolve of various groups and nations.

2. Limitations on the Exercise of Jurisdiction Imposed by Limited Warfare

The exercise of criminal jurisdiction over alleged war criminals has proven to be a difficult matter even in the relatively simple days of World War II. Those problems have been compounded by the characteristics of modern limited warfare.

So far as guerrilla and other less powerful forces are concerned, the problems are several-fold. As with other combatants, they are unlikely to have physical custody of the higher ranking military or civilian officials of their opponents. If they do capture members of enemy forces who are deemed to have

committed war crimes, guerrillas usually lack the facilities or institutions necessary for any semblance of a fair trial by a "duly constituted court".[160] Indeed, even the taking and keeping of prisoners of war places a heavy burden on fast-moving guerrilla forces. It is not hard to believe that "military necessity" in the pre-World War I German sense may prevail more often than not in actual practice. Concerning prisoners, the War Book issued by the German War Office shortly after the Second Hague Peace Conference of 1907 stated:

> That prisoners should only be killed in the event of extreme necessity, and that only the duty of self-preservation and the security of one's own State can justify a proceeding of this kind is today universally admitted.[161]

If prisoners deemed to be war criminals are taken by such forces it may be more advantageous to exploit them politically than to try them for war crimes. North Vietnamese and National Liberation Front (NLF) treatment of American prisoners is a case in point. So long as the prisoners were alive and in the public eye they could be exploited for political advantage. War crimes trials not only could provide a splash of publicity but also concern about justice from many parts of the world. Apparently it was considered more advantageous to threaten trials in order to keep up the political pressure on the United States Government through the families and friends of the prisoners concerned. The prisoners were also valuable to the Hanoi Government in maintaining its control over its own forces and the civilian population of North Vietnam. In this connection, the actions of the DRV in exhibiting American prisoners to hostile civilian crowds to stimulate support is significant. On July 6, 1966, the DRV caused several American prisoners, handcuffed in pairs, to be marched through the crowd-lined streets of Hanoi. The incident also was intended for external effect since it was broadcast by Radio Hanoi,[162] and press releases[163] and photographs[164] were issued by the official North Vietnamese press agency. In May, 1967, a French news agency reported from Hanoi that three American pilots, one of whom was injured, were led through angry shouting mobs on the streets of

Hanoi and later put on display at the International Press Club in Hanoi.[165] Both these actions and others which undoubtedly occurred are violations of both articles three and thirteen of the Geneva Prisoners of War Convention and probably violations of the customary law of war. The significance for the purposes of this paper, however, is not that the acts violated substantive provisions of the law of war, but that they were apparently seen as a politically attractive alternative to trials for war crimes. The United States Government may have assisted in making it politically attractive by its violent reaction to proposed trials.

Another factor bearing on guerrilla type forces, already alluded to, is the kind of settlement likely to come out of limited war. The military outcome is inconclusive and the settlement is basically the transfer of the conflict to a less violent plane rather than to dictate the solution of the conflict. The irregular forces are not defeated and will not agree to any settlement that will not allow them to continue their fight in a political and economic, and perhaps covert military, manner. Since neither side is in a position to dictate the settlement, enemy nationals in the hands of each party are usually returned to their own authorities rather than retained to be tried as war criminals.[166] If agreement cannot be reached on the political disposition of these prisoners, there is likely to be no settlement at all.[167]

Even if irregular type forces were able to obtain custody of enemy nationals accused of war crimes and not forced to give them up as a condition of some kind of settlement, world opinion might be very unfavorable to any trials conducted. The difficulty irregular forces face in constituting tribunals recognized internationally as competent has previously been discussed.[168] The common practice of insurgent groups, particularly those with communist backing,[169] of labeling all of their enemies as war criminals without benefit of trial adds to the uneasiness of non-communist observers concerning the basic fairness of

any trials conducted. In Vietnam the DRV and the Viet Cong have maintained that the Geneva Conventions do not apply at all,[170] and hence, the American prisoners are not entitled to the fair trial provisions of the Prisoners of War Convention.

More conventional type forces engaging in limited warfare also face problems in exercising jurisdiction over alleged war criminals. Some of these problems are much the same as those faced by irregular forces: lack of physical custody of those accused; no clear-cut military decision; a political settlement with no provision for war crimes trials. Other limitations bear harder on parties using conventional forces. It is very difficult to place responsibility within an irregular organization if, in fact, there is much of an organization. Most political and military leaders are unknown and such organization as there is tends to be very decentralized. In a conflict such as Vietnam, in which irregular forces either could not or did not comply with many uncontroverted substantive norms of international law, it would be theoretically possible to try as war criminals a large proportion of the military forces of the DRV operating in South Vietnam as well as many erstwhile South Vietnamese civilians, including most of the members of the NLF.

The credibility for conducting basically fair trials for foreign nationals accused of war crimes is probably higher for those well-established governments most likely to use conventional forces in a limited war. Because they are established governments, however, with official contacts with other governments and domestic political problems, they are more susceptible to some types of pressure against war crimes trials or war crimes related trials than irregular forces. The international influence now being exerted against Bangledesh to repatriate Pakistani prisoners of war rather than try them, in order to get some kind of formal settlement of that conflict, is one type of pressure.[171] More direct pressure against trials by the Government of South Vietnam was exerted

by the NLF. On April 9, 1965, a Viet Cong guerrilla was tried by a South Vietnamese court for acts of terrorism. He was convicted and sentenced to death. The NLF immediately announced that if the sentence was carried out they would execute an American Aid Officer previously captured.[172] The sentence of the South Vietnamese court was not carried out,and apparently that matter was dropped. On June 22, 1965, a Viet Cong guerrilla was executed by a firing squad after he had been tried and convicted of terrorism by a South Vietnamese court. The guerrilla had been apprehended in Saigon while attaching a fuse to a bomb that would have exploded five minutes later.[173] A few days after the execution NLF broadcasts announced that an American soldier held prisoner by the NLF had been executed in reprisal for the execution of the Viet Cong guerrilla.[174] On September 22, 1965, three Viet Cong guerrillas were executed after having been convicted of terrorism and sentenced to death by a South Vietnamese court. On September 26, the NLF announced that they had retaliated by executing two American prisoners of war.[175] In all cases the NLF specifically identified the victims of their reprisals..Undeniably, the directing of reprisals against prisoners of war violated both customary and conventional rules of the law of war. For the purposes of this analysis, however, the most interesting aspects are that the reprisals were taken because of the carrying out of sentences of duly constituted courts; that the reprisals were committed despite and in contempt of the preponderance of world public opinion; and that the reprisals were taken against United States nationals rather than South Vietnamese nationals, even though the trials had taken place in South Vietnamese courts. The NLF wanted the trials, or at least the executions, stopped despite the apparent jurisdiction of the South Vietnamese courts and obviously thought that the pressure used would have more effect against the United States Government than the South Vietnamese Government. Apparently the NLF read the situation correctly, since most of the South Vietnamese trials and all of the executions

stopped almost immediately,[176] presumably due to United States' pressure.

Domestic political forces cannot only exert pressure to prevent trials of foreign nationals but can also exert tremendous pressure to prevent the trial of nationals of the prosecuting power. Because of nationalism and other factors, this is true in any type of conflict. It seems to be particularly true in countries using conventional forces in limited wars against irregular forces. While such a war may not be as politically popular as a general war such as World War II and the military may not be held in as high esteem, the public seems to sympathize with the problem of combating guerrillas and feel in some vague way that guerrilla warfare is "unfair" when practiced against their own forces. The result may be to lump actions which clearly constitute war crimes and violations of domestic military law into the same category with questionable actions taken as a result of the unconventional behavior of the opposing forces. This kind of thinking not only can lead to a lack of public pressure for the trial of nationals of a potential prosecuting state but can actually hinder the military forces of the state in attempts to prosecute individuals for disciplinary or other reasons.[177]

The nature of limited warfare, together with the provisions of the Geneva Conventions of 1949, make trial in an international tribunal very unlikely at this time.[178] Trial in the duly constituted courts of a nation not directly involved in the conflict would be authorized under the universality concepts of both customary and conventional law. A practical problem here is that if prisoners are transferred across borders to another country under detention and without extradition they are ipso facto considered free.[179] Guerrilla forces usually do not have extradition treaties with countries,and those parties to a conflict which have the status of states and have extradition treaties with other countries would be subject to the same pressures discussed earlier in reference to trials in their own courts. Even if the legal and political

problems of transferring accused individuals to a non-participating state could be overcome, finding such states willing to take on such a responsibility in today's "power bloc" world might prove very difficult.

## C. PROSPECTS FOR INTERNATIONAL TRIBUNALS

Ideally, an international tribunal should be the best place to try an individual accused of war crimes. A properly constituted international court with adequate jurisdiction and sanctioning powers would avoid many of the problems associated with war crimes trials in municipal courts. If an accused is tried before the municipal tribunal of an enemy or former enemy state, cries of political persecution and lack of fair trial fill the air. If the accused is tried before a municipal tribunal of his own state, equally loud cries of coverup and whitewash are heard. In addition, an international court may be the only practical bar of justice before which higher-ranking civilian and military officials may be brought, short of the complete collapse of their nation. There is no inherent reason why an international court could not be created to hear charges of war crimes as well as other international crimes. The International Court of Justice functions to a limited extent in adjudicating disputes between states, and the ad hoc tribunals following World War II are solid precedents for granting jurisdiction over individuals accused of war crimes to international bodies.

In trying to determine why more progress has not been made in creating international machinery for imposing criminal sanctions against individuals, it is necessary to examine the possible approaches to the problem within the political, legal, and military context previously discussed. The possibilities that readily come to mind are: ad hoc courts created in response to particular situations; expanding the jurisdiction of the International Court of Justice to include the authority to hear criminal charges against individuals; a new

international court or courts with criminal jurisdiction over individuals; or an international fact-finding body with quasi-judicial powers but without formal sanctioning authority.

### 1. Ad Hoc Tribunals

The ad hoc tribunals convened after World War II have been discussed at length.[180] Those courts were created to deal with obviously criminal acts, and their primary job was to determine the involvement of the individuals brought before them. They were created in an almost ideally favorable climate of national cooperation and public opinion, but, even under such favorable conditions, the impermanent nature of the tribunals left much to be desired. Any court hastily assembled to deal with the legal residue of an international conflict is almost surely going to smack of retribution. It will lack the tradition and prestige that only continuous operation and availibility can give.

Aside from the inherent weaknesses of ad hoc tribunals, the present world context casts a further shadow over the possibilities of such organs exercising criminal jurisdiction. The Geneva Conventions of 1949 seem to rule out ad hoc tribunals as forums for trials arising from grave breaches of those conventions.[181] Certainly, the political conflict between the communist and non-communist worlds would make a widely-based agreement to create such a tribunal very difficult to obtain. Without such an agreement, including the concurrence of both the Soviet Union and the United States, an international court could not be expected to command the acceptance necessary to function effectively. The legal differences between the two major world camps would undoubtedly have a retarding effect on the creation and operation of temporary courts. It would probably be more of a negative factor in the relatively short life of a temporary court than in the continuing activities of a permanent court. Day to day contacts between the systems over a long period of time, as would be the case

on a permanent court, would tend to blunt the sharp points of difference and make for more areas of agreement. The personal relationships developed among judges might blur ideological differences. Ad hoc tribunals would have neither of these advantages and would have the additional burden of trying to begin operation in the midst of a particularly stressful situation.

The impact of limited warfare on the exercise of jurisdiction by international bodies is possibly the most devastating of all. By its very nature, limited warfare is restricted geographically and to a relatively small number of participants. The conflict and the excesses associated with it would not likely engage the interest and attention of the entire world as would a general war such as World War II. The non-governmental groups and small countries playing the most direct roles in such warfare cannot be expected to accept with enthusiasm an international court dominated by the major powers. Yet, assuming the intense interest and involvement of the major powers in almost any conflict today, any tribunal would have to have the confidence and support of at least the Soviet Union and the United States to effectively implement its decisions. Ad hoc tribunals face all the problems of other international bodies arising from the nature of limited warfare as well as special ones.

It is often difficult for non-governmental groups to negotiate international agreements of any kind and agreement concerning an international court would be no exception. The political aspects of modern warfare coupled with the involvement of the civilian population create difficult legal problems even for well-established courts. The problems would be much more difficult for parties trying to establish an ad hoc body or for such a body attempting to adjudicate actual cases. It would also seem to be very difficult for small, underdeveloped countries as well as non-governmental groups to find representatives for such a tribunal with the required training and experience. Finally, the agreements purporting to end limited conflicts are a result of political

expediency rather than some concept of justice. National political priorities are not likely to stress the establishment of a special war crimes tribunal.

### 2. International Court of Justice

The International Court of Justice has the advantage of being a permanent court with established procedures. All members of the United Nations are parties to the Statute of the Court,[182] although many States have filed serious reservations in acceding to its jurisdiction. That jurisdiction is, of course, limited to States.[183]

The International Court of Justice has not been bold in asserting its jurisdiction in the past[184] and would be unlikely to change even if its jurisdiction were enlarged. The reasons for the diffidence on the part of the Court are the same political and legal conflicts between the communist and non-communist blocs discussed in other contexts. So long as those conflicts persist in their present form, it is highly improbable that the pertinent decision-makers will enlarge the jurisdiction of the Court or, if enlarged, that the jurisdic- would be exercised with much effect.

If the political and legal problems could be overcome or reduced so that the International Court of Justice could function as a criminal court, it would have distinct advantages over an ad hoc tribunal. Its very permanence and prestige would tend to make it effective in dealing with the results of limited war. As an organ of the United Nations it could also draw on the support and prestige of that organization.

### 3. Permanent Criminal Court

The concept of a permanent international criminal court has been discussed and analyzed for many years.[185] The United Nations produced a draft code for an International Criminal Court,[186] but agreement was never reached on actually

establishing the Court. The traditional concept of State sovereignty as well as articles two (one) and seven of the United Nations Charter have been cited in arguments against establishing such a tribunal.

As discussed in relation to the International Court of Justice, a permanent court has several advantages over a temporary body. In order to establish a completely new court, however, as opposed to expanding the jurisdiction of the International Court of Justice, it would be necessary to start anew on problems of composition, procedure, and staffing. The new court might or might not be related to the United Nations, but in any event, it would have to start at the bottom in establishing its independence and effectiveness.

The establishment and functioning of an international criminal court faces the same legal and political obstacles as the International Court of Justice. A regional approach, such as that used by the Council of Europe to deal with human rights,[187] might gain acceptance more easily. The Organization of American States has also approved an American Convention on Human Rights, which is not yet in effect.[188]

Regional courts could serve a useful purpose not only in intraregional disputes but in interregional ones as well. It is assumed that such courts would be conceded universal jurisdiction over any individual lawfully brought before it by a member state with physical custody of the individual. This assumption seems reasonable since international law recognizes such competence in each member state in most instances. Member states could fulfill their obligations under the Geneva Conventions of 1949 by agreeing to the jurisdiction of a regional tribunal. Such a tribunal would probably be considered an "international court" within the context of the Conventions. Non-governmental groups might be allowed to become parties to a regional court and would thus be provided with a lawful forum for trying individuals in their custody. Non-member nations would be much more likely to accept the trial of their nationals before

a regional court than before the court of a member state or non-governmental group. The court would tend to be more impartial, and the proceedings would be open to public scrutiny. International public pressure in favor of accepting the decisions of the court would be greater because of the collective approach. Although the trial of individuals accused of war crimes would be only one of the tasks of regional human rights tribunals, such courts would have all the advantages of other permanent courts.

In order to expand the jurisdiction of existing or planned regional courts to encompass war crimes and to create new courts with such jurisdiction, the common interests inherent in effectively sanctioning violations must be acknowledged by the states and groups concerned. The same common interests exist on a world-wide scale, but it should be easier to reach a consensus on a regional level. The fact that the effective enforcement of the law of war is really a human rights question should make the expansion of the European and American systems less difficult. A regional tribunal under the auspices of the Organization of American States might prove to be even more important than the European court. The political, economic, and social conditions in many American countries are less stable than in Europe and more likely to precipitate limited wars.

The regional systems in effect or proposed should be encouraged to broaden their scope to include sanctions against individuals guilty of war crimes. Hopefully, other regional organizations with judicial organs would develop in Asia and Africa in order that a regional tribunal would be available to protect human and material values in any conflict situation.

### 4. Fact-Finding Body Without Sanctioning Power

In an effort to find a workable system through which the moral and political force of world opinion can be brought to focus on individuals, serious

consideration should be given to establishing an international body with broad fact-finding powers but with no direct sanctioning power. Such a tribunal would need wide powers of subpoena and access to trouble spots in order to make determinations of fact concerning acts which might be violations of the law of war and the involvement of particular individuals in such acts. Once the fact-finding task was completed, the results could be made public, utilizing all the impact of the modern press and media on national and public opinion. The jurisdiction of the court would not extend to the application of international law to the facts to determine individual guilt. That would be left to the municipal tribunals with physical custody of the individuals. Depending on the legal system involved, the municipal courts might take the facts determined by the international tribunal as final and proceed to apply the law to decide guilt or innocence in particular cases. Other courts might have a full-scale trial to determine the facts in each individual case. In any event, the actual criminal sanctions, in the event of a finding of guilty, would be applied by municipal tribunals.

This type of international tribunal with limited jurisdiction might prove more effective in the long run than plans for a full-scale criminal court. It should be easier to bring into existence since it impinges less on state sovereignty. No individual could be sentenced by the international body. Actual criminal sanctions could only be applied by municipal courts after being satisfied of guilt. Nations with physical custody of individuals named in fact-finding reports could always elect to ignore apparently incriminating evidence and simply not exercise jurisdiction. Since, in most cases, nations will have physical custody of their own nations, the final decision would usually be a domestic one. If individuals were in the custody of an enemy nation or group, the legal decision would be made by that decision-maker but only after an independent finding of facts. It would probably be advisable, at least in the

beginning, to limit the international fact-finding body to situations involving the possible commission of traditional war crimes and prohibit it from making determinations involving the reasons for the conflict or the justness of the positions of various nations and groups.

Political and legal differences would still be present under such a plan but should be muted due to the modest powers of the tribunal. It would surely be easier for governments and other groups to find common ground for agreement if the court limited its investigations generally to the actions of individuals and had no sanctioning powers. Legal differences would not be as important since the proposed international body would not apply any law in order to assess guilt. There would undoubtedly be some compromise necessary, however, even on fact-finding procedure. The permissibility of cross-examination of witnesses and its form is one area that immediately comes to mind.

The two-step approach might also help solve some, but not all, of the problems caused by the nature of limited warfare. Parties would be more likely to allow access to investigate to an international body than to an adversary. Reports of an international tribunal would tend to have more effect on the population of states and other groups having custody of accused individuals than would allegations of war crimes by an opposing party. An international fact-finding tribunal could not prevent the use of terrorism or other pressure to prevent trials, but well-documented reports from a respected international court should reduce the use of such tactics. States not parties to a particular conflict might be more willing to accept accused individuals for trial if they had before them the report of an impartial international fact-finding court.

The creation and operation of such a body would not be easy. The history of the inquiry procedures under the Red Cross Conventions is not a happy one.[189] However, the United Nations has undertaken several fact-finding missions with

some success,[190] indicating that it is possible. By limiting the investigations to situations primarily involving individuals, and affecting governments only if the actions investigated were governmental policy, the tribunal or its investigating teams should encounter less resistence than similar groups have in the past. Hopefully the prestige and moral power of such a tribunal would evolve to the point where it would be possible to gradually enlarge its jurisdiction without encountering overpowering opposition.

## D. PROSPECTS FOR MUNICIPAL TRIBUNALS

Experience has shown that governments and non-governmental groups are generally unable to perceive or unwilling to acknowledge their common interests in criminal sanctions against violators of the law of war to the extent necessary to establish a full-scale international criminal court. Although it has been stated that ideally an international court would be the best place to try individuals accused of war crimes, international law does not limit jurisdiction to such a court. In fact, the Geneva Conventions of 1949 take the opposite tack -- granting immediate jurisdiction to municipal courts and jurisdiction to any future international court that the nations concerned can agree on. The universality principle has become so well-established in international law that municipal courts probably have jurisdiction in any event. As stated in the Eichmann Judgment:

> Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial.[191]

Municipal courts have the advantage of being part of an established, functioning judicial system. If they can be used to effectively sanction violators of the law of war then a very desirable deterrent will be established.

1. Trial of Nationals of States Other Than the State Exercising Jurisdiction

The hundreds of municipal trials conducted after World War II have been discussed previously.[192] A very large percentage of those trials involved the trial of a national of a state other than that under whose auspices the tribunal was convened. Of course, there were trials of nationals of the states exercising jurisdiction, and the Soviet Union continued such trials until at least the beginning of this decade.[193] The situation after World War II was very favorable to the exercise of municipal jurisdiction on the part of the victorious Allies. They had custody of anyone they could find, and public opinion overwhelmingly supported such trials. As was the case with the international tribunals, the enormity of the crimes left very little for the courts to do in many cases except to decide the extent of the involvement of the particular individual being tried. That was surely true in regard to the organizations found by the International Tribunal at Nuremberg to be criminal.[194]

As with all other aspects of the law of war, ther have been major changes wrought by the current political and military context. The legal context has not really changed -- serious differences certainly existed after World War II -- but the national interests of various countries, particularly the Soviet Union and the United States, as perceived by their leaders, have changed. This difference in perception has most assuredly been caused to a great extent by the very same political (i.e., the "cold war" between the communist and non-communist nations) and military (i.e., limited warfare in all its variations) considerations already discussed.

The political schism between the two major blocs makes the exercise of jurisdiction over a non-national particularly unlikely. The basic mistrust existing makes common interests difficult to see. That mistrust is fueled by the fact that the political differences are so ideologically charged. Communist theory cannot tolerate cooperation with capitalist countries except in the most

peripheral areas. Of course, the theory is not always followed in practice. On the other side, many western leaders can see nothing good about nations that espouse communism and feel that the best way to handle them is to have as little contact as possible. The governments in power do not always hold these views, however, and those that do do not always follow them.

At this time law, particularly international law, cannot span the political gap and overcome the differences. The non-communist nations do not believe that their nationals can receive a fair and impartial trial in a communist country or in one backed by a communist country. Even a slight knowledge of communist legal and political theory and practice lends credence to that belief. The communist group, led by the Soviet Union, have a strong historical distrust of international law as a threat to their domestic political systems.[195] The usual lack of a strong legal heritage of their own makes it very difficult for them to understand an independent judicial system basically free from political pressures. That is not to say that communist fears are entirely baseless. Even strong judicial systems may bend under the public pressures of trying the nationals of an enemy or former enemy.

The political problems are complicated further by the involvement of small, underdeveloped nations and non-governmental groups. Even if the major powers backing these participants wished to encourage the exercise of criminal jurisdiction over foreign nationals and to assure fair trials, they would be facing an impossible task in some cases. The non-governmental groups usually have no judicial system at all, and the small nations involved are often as underdeveloped politically and legally as they are economically. Their political and legal systems and standards may work well and fit the needs of their situation and yet be completely unacceptable to more developed nations for the trial of their nationals.

Current military realities also mitigate against the exercise of juris-

diction over foreign nationals. Guerrilla warfare makes it very difficult for both the guerrilla and his more conventional opponent. These difficulties were discussed in the preceding section dealing with problems imposed by limited warfare in general, as were the problems arising from the political nature of the so-called "settlement agreements" ending at least one phase of modern conflicts.[196]

The prospects for the exercise of municipal jurisdiction over foreign nationals accused of war crimes looks very dim to this writer. The establishment of an international fact-finding body might stimulate the exercise of this jurisdiction to a certain extent but would probably prove to be more beneficial in aiding the exercise of municipal jurisdiction over nationals of the prosecuting state.

2. Trial of Nationals of the State Exercising Jurisdiction

Almost all of the conventions entered into since the middle of the nineteenth century laying down rules for the conduct of war have primarily relied on each nation to punish its own nationals for violations of the established norms.[197] It is much simpler legally and politically for nations to try their own nationals. The problem, of course, is that nations usually perceive no motive for prosecuting their own people for allegedly violating the law of war.

In order to enhance the prospects for the exercise of jurisdiction by nations over their own nationals, it will be necessary to show that by substantially complying with the law of war advantages can be obtained militarily, politically, and economically. Militarily, the complying nation gains in increased discipline and efficiency among its armed forces as well as by not provoking the enemy to greater efforts.[198] Compliance is particularly rewarding politically in limited war situations since there will be many spectator nations and groups as well as the general public who will be judging the actions

of the participants. In open societies, such as the United States, compliance should also be politically rewarding domestically, resulting in greater public support for the war effort. The economy of force resulting from observing the law of war would result in less expense to the participants, whether characterized in terms of human or material values.

Convincing participants in warfare that their best interests lie in policing themselves will not be easy. The most difficult problem undoubtedly will be in assuring that the overall policies of the governments themselves are within the guidelines of accepted norms. Subordinate military personnel are not likely to be prosecuted and probably should not be prosecuted for carrying out the orders of their governments in areas of doubtful legality. Clear cases of illegal governmental strategy, such as that of Germany in World War II, are one thing, while new techniques of guerrilla warfare and responses to guerrilla warfare are another. If respected international legal scholars cannot agree on the exact norms of international law as applied to limited warfare it is unfair to place that burden on the military forces of the participants. The substantive rules themselves must be realistically brought up-to-date with current military and political conditions before there is much hope of persuading nations to comply and insure that their military forces comply.

No particularly serious problems should be encountered because some participants are non-governmental groups. The leaders of those groups understand military and political reality as well as those of established nations, and they have an even greater need for economy of force, due to the availability of fewer resources. In order to have any organization at all, these groups must have internal order and discipline. This requires some procedure for "trying" individuals accused of deviating from the group norms. That machinery can be used for punishing members who violate the law of war if the group leaders perceive that conforming to the law of war is in the best interests

of the group. Again, it is absolutely necessary for the substantive law of war to be made realistic to these groups before there is much hope for compliance.

The international fact-finding court suggested in the previous section could be of great assistance in prodding recalcitrant nations into action. There is no question but that the effect would be greater on nations with open societies. Their governments must necessarily pay greater and more prompt attention to public opinion. Nations with authoritarian governments could not be pressured so easily, but the effort might still be effective. It is also quite possible that it will be harder and take longer to convince communist and other authoritarian governments and groups that it is in their best interests to assure compliance with reasonable rules of warfare. That is no reason why the western nations, and particularly the United States, should not take the lead. If compliance truly is advantageous, unilateral compliance should be even more advantageous. Considered from every angle, trial of accused violators by their own states seems to offer the best hope of effective criminal sanctions against violators of the law of war in the foreseeable future.

## IV. CONCLUSIONS

It has been an established fact throughout history that force in some form is necessary to insure order in even the best regulated and most homogeneous societies. International society is neither well-regulated nor homogeneous, and the right of nations and some non-governmental groups to use force in certain circumstances is recognized by international law. Sometimes that force is used to enhance inclusive values and sometimes for exclusive purposes, but in any case there is much to be gained in human and material values by regulating and limiting the types and amounts of force used. The substantive law of war, both conventional and customary, lays down the rules to be followed

by participants and non-participants alike to achieve the greatest possible conservation of these essential values. Sanctions of various kinds have been used in an attempt to insure the observance of the substantive norms. Criminal prosecution of individuals accused of violating those norms is one such sanction.

Some commentators feel that criminal prosecution is no deterrent to the commission of war crimes.[199] That is probably true for the leaders of nations and groups since the type of individual who aspires to great power or who is imbued with a vision of grandeur for his nation or group is not likely to let concern for his own safety affect his actions. It does not follow, however, that this overweening ambition extends very far down into the ranks of subordinates. For the great bulk of civilian and military officials of any nation or group a viable threat of criminal prosecution for war crimes would be a substantial deterrent. It must be remembered that nations and other organizations act only through individuals and that an organization of any size must act through many different individuals with varying degrees of power and authority. It seems, therefore, that the threat of individual criminal prosecution would provide a substantial, even though not complete, deterrent to the commission of war crimes. The ultimate objective of any sanction, of course, is to inculcate the positive norms of desirable conduct into the mores of society and the consciences of individuals in order that self-enforcement becomes the standard.

What, then, are the most practical and effective ways to create a viable threat of criminal prosecution for war crimes? How can the exercise of existing jurisdiction be stimulated?

A fundamental way to stimulate the exercise of jurisdiction over individuals accused of war crimes is to bring the substantive law of war into conformity with modern conditions. Unless the substantive rules are relevant, any type of sanctioning device is sure to be irrelevant. This is not to say that

international law should slavishly allow any new and devious twist to warfare that the mind of man can conceive, but both the purposes and methods of warfare have changed. The law must adapt and create new norms to reflect these new purposes and methods.

Once the substantive law is relevant to current conditions we must work within existing or reasonably attainable institutions to enforce that law. On the international level, the use of regional courts would seem to be a good place to start. A regional approach seems to be a realistic compromise between a criminal court with effective world-wide jurisdiction, which is unattainable at this time, and reliance on national courts, which have so far proved to be ineffective. On the municipal level, domestic jurisdiction is the easiest and most likely jurisdiction to be exercised if the motivation for exercise is present. That motivation can be established and maintained only through convincing decision-makers and potential decision-makers of the advantages to be obtained through insuring compliance with the law of war. An international fact-finding body could be a great help in reinforcing realistic concepts of self-interest.

So long as self-interest is the mainspring of human behavior, nations and groups can be expected to follow a course of action which is regarded or stated as calculated to further their own interests. In order to establish the more or less humane law of war as the standard to be followed in conflict situations, it is necessary to make certain that compliance is more advantageous than non-compliance. Just as importantly, the appropriate decision-makers must understand where their real interests lie. Once world leaders are convinced that they are more likely to achieve their goals through compliance rather than non-compliance, domestic municipal jurisdiction should be exercised with a vengence. Hopefully, the growing interdependence of the people of the world economically, politically, legally, scientifically, and ecologically will gradually change

perceptions of self-interest until all limitations on the exercise of internationally accepted jurisdiction over war crimes will melt away.

Footnotes

[1] Harvard Research in International Law, Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. (Supp.) 435 (1935).

[2] The Trial of the Major War Criminals Before the International Military Tribunal, v. 1, at 11 (1947).

[3] C. Rhyne, International Law: The Substance, Processes, Procedures and Institutions For World Peace With Justice 417-18 (1971).

[4] A third doctrine of "chivalry" is sometimes used in traditional literature but has been reduced to no practical importance by the techniques of modern warfare.

[5] M. McDougal and F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 422-23 (1961).

[6] Id. at 669.

[7] Id. at 529.

[8] W. Bishop, International Law: Cases and Materials 461 (3rd ed. 1971).

[9] Id. at 463.

[10] M. McDougal and F. Feliciano, supra. note 5, at 164.

[11] Id. at 165.

[12] The Trial of the Major War Criminals Before the International Military Tribunal, v. 22, at 565-66 (1949).

[13] M. McDougal and F. Feliciano, supra. note 5, at 706.

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[15] Id.

[16] Id. at 712-17.

[17] See p. 6 infra.

[18] Harvard Research in International Law, supra. note 1, at 445.

[19] M. McDougal and F. Feliciano, supra. note 5, at 706.

[20] E. Dumbauld, The Life and Legal Writings of Hugo Grotius 69 (1969).

[21] C. Wolff, Jus Gentium Methodo Scienticica Pertractatum, vol. II, s. 794, at 411 (Classics of International Law 1934).

[22] M. Vattel, The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, bk. III, c. VIII, s. 141, at 414 (transl. from the French 1820).

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[27] Id. at 182.

[28] Id. at 182-83.

[29] A. Higgins, The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War (1909).

[30] Id. at 1.

[31] Id. at 5.

[32] Convention for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field, approved August 22, 1864, 22 Stat. 940, T.S. 377.

[33] A. Higgins, supra. note 29, at 13.

[34] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, approved July 6, 1906, 35 Stat. 1885, T.S. 847.

[35] A. Higgins, supra. note 29, at 39-59.

[36] Id. at 540.

[37] Id. at 31.

[38] Hague Convention With Regard to the Laws and Customs of War on Land, approved July 29, 1899, 32 Stat. 1803, T.S. 403; Hague Convention With Regard to the Laws and Customs of War on Land, approved October 18, 1907, 36 Stat. 2277, T.S. 539.

[39] Convention for the Adaption of the Principles of the Geneva Convention to Maritime War, approved October 18, 1907, 36 Stat. 2371, T.S. 543.

[40] A. Higgins, supra. note 29, at 563.

[41] Id. at xiii.

[42] Report of the Commission on the Responsibility of the Authors of the of the War and on Enforcemnt of Penalties, 14 Am. J. Int'l L. 95 (1920).

[43] Id. at 118.

[44] Id. at 121.

[45] Id. at 121-22.

[46] Id. at 122-23.

[47] Treaty of Peace With Germany, 2 Treaties and Other Int'l Agreements of the United States 137, reprinted in part in 16 Am. J. Int'l L. 628 (1922).

[48] W. Bishop, supra. note 8, at 997.

[49] German War Trials, Report of Proceedings Before the Supreme Court at Leipzig, 16 Am. J. Int'l L. 629 (1922).

[50] Id.

[51] W. Bishop, supra. note 8, at 997. See also, Mullins, The Leipzig Trials (1923).

[52] Geneva Convention Concerning Prisoners of War, approved July 27, 1929, 47 Stat. 2021, T.S. 846, 118 L.N.T.S. 343.

[53] Convention Concerning the Amelioration of the Conditions of the Wounded and Sick of Armies in the Field, approved July 27, 1929, 47 Stat. 2074, T.S. 847, 118 L.N.T.S. 303.

[54] 5 Dept. State Bull. 317 (1941).

[55] History of the U.N. War Crimes Commission and the Development of the Laws of War, compiled by the U.N. War Crimes Commission, at 88-89 (1948).

[56] Belgium, Czechoslavakia, the Free French National Committee, Greece, Luxembourg, Netherlands, Norway, Poland, and Yugoslavia. The Chinese Govern-

ment had accepted the principles of the Declaration on January 9, before the formal adoption, and the Union of Soviet Socialist Republics subscribed to them on January 14, the day after formal adoption.

57 Wright, History of the United Nations War Crimes Commission and the Development of the Laws of War, app. B, at 109 (1946).

58 9 Dept. State Bull. 310-311 (1943).

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60 R. Jackson, Report of Robert H. Jackson United States Representative to the International Conference on Military Trials (1945).

61 Id. at 104-05.

62 Id. at 105-06.

63 Id. at 107.

64 Agreement by the Government of the United States of America, The Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed September 2, 1945, 59 Stat. 1544, E.A.S. 472.

65 Denmark, Norway, Belgium, Luxembourg, Netherlands, Poland, Czechoslavakia, Yugoslavia, Greece, Australia, New Zealand, India, Ethiopia, Honduras, Panama, Haiti, Paraguay, Uruguay, and Venezuela.

66 Martin Bormann was tried in absentia.

67 R. Woetzel, The Nuremberg Trials in International Law (1960).

[68] W. Bishop, supra. note 8, at 1017.

[69] R. Woetzel, supra. note 67, at 15.

[70] G.A. Res. 95 (I), U.N. Doc. A/236 (1946).

[71] 8 Dept. State Bull. 318 (1945), reprinted in U.S. Naval War College, International Law Documents, 1944-45, at 204-06 (1945).

[72] Proclamation by the Emperor of Japan, issued September 2, 1945, 59 Stat. 1733, E.A.S. 493, reprinted in U.S. Naval War College, International Law Documents, 1946-47, at 141 (1948).

[73] Instrument for Surrender of Japan, executed September 2, 1945, 59 Stat. 1733, E.A.S. 493, reprinted in U.S. Naval War College, International Law Documents, 1946-47, at 139-141 (1948).

[74] General Headquarters Supreme Commander for the Allied Powers, "General Orders No. 1", January 19, 1946, Dept. State Pub. No. 2675, at 5-10, T.I.A.S. No. 1589, reprinted in U.S. Naval War College, International Law Documents, 1946-47, at 317-18 (1948).

[75] Reprinted in U.S. Naval War College, International Law Documents, 1946-47, at 319-26 (1948).

[76] U.S. Naval War College, International Law Documents, 1948-49, at 71 (1950).

[77] Id. at 107. Concerning the status of the Tribunal as an international court, see Hirota vs. MacArthur, 335 U.S. 876, 388 U.S. 197 (1948).

[78] R. Woetzel, supra. note 67, at 37.

[79] Id. at 218.

[80] French Ordinance of August 28, 1944, 3 War Crimes Reports 93 (1946); Norwegian Law of December 12, 1946, 3 id. 83; Netherlands Extraordinary Penal Law Decree of December 22, 1943, 11 id. 97; Danish Law of July 12, 1946 on the Punishment of War Criminals, 15 id. 32. For a general discussion of these statutes and cases based on them, see McDougal and Feliciano, supra. note 5, at 712-14.

[81] Id. at 714-17. Concerning trials conducted by the United States of some "minor" Japanese war criminals, see R. Miller, War Crimes Trials at Yokohama, 15 Brooklyn L. Rev. 191 (1949). As to the activities of the United States Navy War Crimes Commission on Guam and Kwajalein, which conducted trials of Japanese and other Far Eastern war criminals, see G. Erickson, United States Navy War Crimes Trials (1945-49), 5 Washburn L.J. 89 (1965-66).

[82] Official Gazette of the Control Council for Germany, No. 3, 31 January 1946 (Berlin, Allied Secretariat) at 50-55; reprinted in T. Taylor, Nuremberg Trials, War Crimes and International Law, Int'l Council. No. 450, at 358-63 (1949).

[83] The full title was "Organization and Powers of Certain Military Tribunals"; reprinted in T. Taylor, supra. note 82, at 363-69.

[84] Id. Art. X.

[85] R. Woetzel, supra. note 67, at 219-26. See generally, T. Taylor, supra. note 82.

[86] See the testimony and documents recorded in The Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg (1947-49).

[87] J. Fawcett, The Eichmann Case, 1962 Brit. Y.B. Int'l L. 181-82.

88 The Attorney-General of the Government of Israel v. Adolf, the son of Karl Adolf Eichmann, Criminal Case No. 40/61, District Court of Jerusalem, Israel, December 11-12, 1961, sec. 26; affirmed Criminal Appeal No. 336/61 Supreme Court of Israel, May 29, 1962.

89 For an interesting analysis of possible Zionist political motives, see W.T. Mallison, Jr., The Zionist-Israel Juridical Claims to Constitute "The Jewish People" Nationality Entity and to Confer Membership in it; Appraisal in Public International Law, 32 Geo. Wash. L. Rev. 983 (1963-64).

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91 Id. secs. 41-52.

92 See pp. 29-30 infra.

93 The Attorney-General of the Government of Israel v. Adolf, the son of Karl Adolf Eichmann, supra. note 88, trial court judgment, secs. 17-20.

94 See p. 35 infra.

95 See generally, W. Bishop, supra. note 8, at 564 n. 50.

96 The Estonian Republic Supreme Court's criminal panel convicted and sentenced three men for aiding Nazis in war crimes against Soviet citizens -- one was sentenced to death and two, to confinement, Pravda, August 6, 1972, at 6; the Circuit session of the Military Tribunal of the Red Banner, Kiev Military District, tried six men for treason and participation in mass atrocities and executions while serving Nazis as camp guards -- five were sentenced to death and one, to confinement, Pravda, July 12, 1972, at 6; the North Caucasus District Military Tribunal tried ten former police agents accused of

treason and participation in mass atrocities in fascist occupied Pyatigorsk -- four were sentenced to death and the other six to confinement, Izvestia, June 9, 1972, at 4; the trial at Minsk of six men charged with collaboration with the Nazis in the commission of war crimes -- three were sentenced to death and the other three to confinement, Izvestia, November 11, 1971, at 4; the trial in Leningrad of five men for collaboration with the Nazis in the war crimes of torture and unlawful executions during World War II -- two were sentenced to death and the other three to confinement, Kasnaya zvezda, December 15, 1970, at 3; the trial of six men at Stravopol for collaboration and war crimes, Pravda, May 14, 1968, at 6; the trial of four men at Elista for collaboration and war crimes -- all four were convicted and sentenced to death, Pravda, January 11, 1968, at 6 and Pravda, March 14, 1968, at 6; the trial of thirteen defendants at Krasnodar for collaboaration and war crimes (one was tried in absentia) -- seven were sentenced to death and the other six to confinement, Pravda, December 22, 1967, at 6; the trial of ten defendants for collaboration and war crimes -- seven were sentenced to death and the other three to confinement, Pravda, November 16, 1967, at 6 and Pravda, December 4, 1967, at 6; the trial of V. Karpavicius at Alytus, Lithuanian Republic for collaboration and war crimes -- he was sentenced to death, Izvestia, May 19, 1967; the trial of five defendants for collaboration and war crimes against citizens of Russia, Poland, Czechoslavakia, France, Holland, and other European countries -- four were sentenced to death and one to confinement, Pravda, February 25, 1967; the trial of two defendants at Zhitomir for collaboration and war crimes -- both were sentenced to death, Pravda, January 25, 1967, at 6; the trial of eleven defendants at Nikolayer for collaboration and war crimes, Pravda, March 12, 1966, at 4; the trial of six defendants before a military tribunal at Mineralniye Vody, Stravopol Territory for collaboration and war crimes -- five were sentenced to death and one to fifteen years confinement, Pravda,

February 1, 1966, at 4 and Pravda, February 14, 1966, at 4; the trial of I. Melnikov at Krasnodon for collaboration and war crimes -- he was sentenced to death, Pravda, December 17, 1965, at 6; the trial of three defendants at Rokiskis for collaboration and war crimes -- all three were sentenced to death, Izvestia, November 17, 1965, at 4; the trial of Alfonsas Stonis before the Lithuanian Republic Supreme Court of collaboration and war crimes -- he was sentenced to death, Izvestia, August 22, 1965, at 6; the trial of six defendants at Krasnodar for collaboration and war crimes -- all were sentenced to death, Pravda, June 2, 1965, at 4; and Pravda, June 9, 1965, at 4; the trial of seven defendants for collaboration and war crimes -- all were convicted and sentenced to confinement, Izvestia, March 17, 1964, at 6; the investigation and trial of Antonas Impuliavicius and nine other defendants for collaboration and war crimes (Impuliavicius was allegedly living in the United States) -- eight, including Impuliavicius, were sentenced to death and one case was returned for further investigation, Izvestia, October 6, 1962, at 4 and Izvestia, October 21, 1962, at 6; the trial of nine defendants before a military tribunal at Krasnodar for collaboration and war crimes -- six were sentenced to death and the other three to confinement, Trud, July 25, 1962, at 4; the trial of seventeen defendants for collaboration and war crimes -- all seventeen were convicted and sentenced to death, Sovetskaya Bylorussia, July 19, 1962, at 4; the trial at Novorosslisk of six defendants for collaboration and war crimes in 1943-44, Pravda, September 13, 1961, at 6; the trial in Minsk of N.A. Ekert for collaboration and war crimes -- he was sentenced to death, Pravda, September 9, 1961,at 6 and Pravda, September 13, 1961, at 6.

97 The trial at Gatchina, Leningrad Province of V. Vorontsova for collaboration with the Nazis, Pravda, December 7, 1967, at 6.

98 A statement of A. Kosygin, chairman of the U.S.S.R. Council of

Ministers, to Soviet delegates to an international conference on questions of the prosecution of Nazi war criminals. He criticized the Federal Republic of Germany for applying their domestic statute of limitations to war crimes and cited the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the Potsdam Agreement and the Charter and Judgment of the International Military Tribunal at Nuremberg. He called for the punishment of war criminals "regardless of when or by whom these crimes were committed". Pravda, March 26, 1969, at 1 and Izvestia, March 26, 1969, at 1; several reports in favor of the trial of Eichmann by Israel, Pravda, June 2, 1960, at 3, Izvestia, June 28, 1961, at 5, and Izvestia, August 17, 1961, at 12.

99 The report of a press conference in Simferopol by P.T. Tronk, chairman of the Ukraine Republic Council of Ministers, in which he cited newly discovered evidence of Nazi war crimes and called upon the Federal Republic of Germany to extradite the German nationals responsible to stand trial in the Soviet Union, Pravda, December 26, 1970, at 6; the report of a Soviet note to Great Britain demanding extradition of Yu. Ye. Chapodze for trial pursuant to Soviet law for alleged war crimes committed on Soviet territory during World War II, Pravda, April 25, 1970, at 5; a newspaper report accusing Karlis Lobe of war crimes, alleging that he was living in Sweden and calling upon Sweden to deliver him to the Soviet Government for trial, Izvestia, May 7, 1969, at 6; the newspaper report of the start of the trial of four defendants at Vitebsk for collaboration and war crimes stated, "The materials from the 'Vitebsk case' strike a blow with renewed force at those foreign propagandists who are trying to whitewash Hitler's 'new order'.", Pravda, April 24, 1966, at 6; a newspaper report of notes sent to the United States, Canada, and the Federal Republic of Germany demanding the extradition of three alleged collaborators and war criminals purportedly living in those countries. A later

report stated that all three defendants would be tried in abstentia purusant to the Latvian Republic criminal code, Pravda, June 12, 1965, at 4 and Pravda, September 26, 1965, at 6; the newspaper report of a note from the Soviet Government to the United States Government demanding custody of Karl Linnas for trial on charges of war crimes committed during 1941-42 and citing the post-World War II agreements between the Allies, Izvestia, October 14, 1961, at 2; newspaper reports setting forth the alleged war crimes of Ainervin Iokhanovich Mere, citing the post-World War II agreements between the Allies and demanding that Great Britain extradite him to the Soviet Union for trial, Sovetskaya Estonia, September 16, 1960, at 4 and Pravda, November 11, 1960, at 5; the report of a press conference by the Extra-ordinary State Commission on the Establishment and Investigation of the Crimes of the German Fascist Invaders setting forth the alleged war crimes of Theodor Oberlaender, a minister of the Federal German Republic Government, Izvestia, April 6, 1960, at 4.

[100] A statement by A. Kosygin, Chairman of the U.S.S.R. Council of Ministers, to delegates to an international conference on questions concerning the prosecution of Nazi war criminals criticizing the Government of the Federal Republic of Germany for applying their domestic statute of limitations to war crimes and citing the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the Potsdam Agreement and the Charter and Judgment of the International Military Tribunal at Nuremberg, Pravda, March 26, 1969, at 1 and Izvestia, March 26, 1969, at 1; a statement by Patriaarch Alexy of the Russian Orthodox Church condemning the Government of the Federal Republic of Germany for its intention to discontinue prosecution of alleged war criminals because of the expiration of the German statute of limitations -- claiming that there is no time limitation on the prosecution of such crimes and stating, "the resolute condemnation of the war criminals is a guarantee of the safeguarding of future well-being and the prevention of new

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101 The newspaper report of the Soviet ratification of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which had been signed on January 6, 1969, Izvestia, March 14, 1969, at 2.

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105 The Genocide Convention, adopted December 9, 1948, 78 U.N.T.S. 277, art. I.

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108 International Committee of the Red Cross, Draft Revised or New Conventions for the Protection of War Victims, at 245 (1948).

109 International Committee of the Red Cross, Revised and New Draft Conventions for the Protection of War Victims. Texts approved and amended by the XVIIth International Red Cross Conference (Revised Translation), at 171 (1948); International Committee of the Red Cross, Remarks and Proposals submitted by the International Committee of the Red Cross, Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference at Geneva (April 21, 1949), at 95 (1949).

110 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (hereinafter cited as GWS); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (hereinafter cited as GWS Sea); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (hereinafter cited as GPW); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, T.I.A.S. 3365, U.N.T.S. 287 (hereinafter cited as GC). See generally, J. Pictet, The New Geneva Conventions for the Protection of War Victims, 45 Am. J. Int'l L. 462, 464-68 (1951).

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112 Commentary on the Geneva Conventions of 12 August 1949, vol. I (GWS), at 358-59 (J. Pictet ed. 1952).

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123 GPW.

124 GC.

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131 GC.

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140 O'Callahan vs. Parker, 395 U.S. 270 (1969); Reid vs. Covert, 354 U.S. 1 (1957).

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142 See generally, G. Draper, The Red Cross Conventions (1958); Pope Pius XII, An International Code for the Punishment of War Crimes, 28 St. John's L. Rev. 1 (1953); J. Dillon, The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War, 5 Miami L. Q. 40 (1950-51).

143 N.Y. Times, July 15, 1966, at 1, col. 3 and at 3, col. 1; id. July 19, 1966, at 3, col. 1; id. July 20, 1966, at 1, col. 8.

144 Id. July 17, 1966, at 8, col. 3; id. July 21, 1966, at 1, col. 5; id. July 23, 1966, at 2, col. 6. Many United States citizens well-known for opposing the Vietnam War joined in the pressure on Hanoi, id. July 16, 1966, at 1, col. 1; id. July 20, 1966, at 1, col. 8.

145 This analysis generally follows the characterizations found in R. David and J. Brierly, Major Legal Systems in the World Today (1968).

146 Id. at 12.

147 See generally, B. Ramundo, The Soviet Legal System - A Primer (1971).

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149 V. Lenin, Marx, Engels Marxism (Foreign Languages Publishing House, 4th English Edition), at 81 (1951).

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151 See generally, P. Archer, Communism and the Law (1963); H. Berman, Soviet Criminal Law and Procedure, the RSFSR Codes (1966); K. Grzybowski, Soviet Legal Institutions (1962); V. Gsovski and K Grzybowski, Government, Law and Courts in the Soviet Union and East Europe; J. Hazard and I Shapiro, The Soviet Legal System (1962); H. Kelsen, The Communist Theory of Law (1955); I. Lapenna, State and Law, Soviet and Yugoslav Theory (1964); R. Schlesinger, Soviet Legal Theory (1955); Z. Zile, Ideas and Forces in Soviet Legal History (1967).

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153 Ceylon, Israel, the American State of Louisiana, the Republic of the Philippines, Scotland, and the Union of South Africa are examples.

154 See pp. 15-17 infra.

155 1 Wright, A Study of War 250 (1942).

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157 A good legal analysis of the Cuban missile confrontation can be found in W.T. Mallison, Jr., Limited Naval Blockade or Quarantine - Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 335 (1962).

158 The Vietnam and Bangledesh conflicts are good illustrations.

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160 Id. art. 84.

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170 H. Meyrowitz, The Law of War in the Vietnamese Conflict, Annuaire Francais de Droit International, v. 13, at 143-201 (1967), translated and reprinted in The Vietnam War and International Law, R. Falk ed., v. 2, at 516-71 (1969).

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174 Id. June 25, 1965, at 1, col. 6; id. June 26, 1965, at 1, col. 8 and at 2, col. 7.

175 Id. September 28, 1965, at 1, col. 1.

176 Id. November 17, 1967, at 16, col. 6.

177 The recent case of Lieutenant Calley is a notorious example.

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179 2 Oppenheim, International Law 718 (7th ed. Lauteracht ed. 1952).

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181 See p. 37 infra.

182 United Nations Charter, art. 93.

183 Statute of the International Court of Justice, art. 34, para. 1.

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185 Bridge, Case for an International Court of Criminal Jurisdiction and the Formulation of International Criminal Law, 13 Int'l & Comp. L.Q. 1255

(1964); Brierly, Do We Need an International Criminal Court? 1927 Brit. Y.B. Int'l L. 81; Golt, Necessity of an International Court of Criminal Justice, 6 Washburn L. J. 13 (1966); Pella, Toward an International Criminal Court, 44 Am. J. Int'l L. 37 (1950); Wright, Proposal for an International Criminal Court, 46 Am. J. Int'l L. 60 (1952).

186 U.N. Doc. A/2136; U.N. Doc. A/2645.

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192 See pp. 22-29 infra.

193 See pp. 28-29 infra.

194 See pp. 18-19 infra.

195 See pp. 52-53 infra.

196 See pp. 56-64 infra.

197 See particularly pp. 8-10 infra.

198 M. McDougal and F. Feliciano, supra. note 5, at 605.

199 J. Appleman, Military Tribunals and International Crimes 10 (1954).